92-282

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

REVEREND ROBERT PEARSON, ET AL.,
Petitioners,

- v. -

PLANNED PARENTHOOD MARGARET SANGER CLINIC (MANHATTAN), ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

I. Do "women seeking abortions" constitute a valid class for purposes of "class animus" requirement of 42 U.S.C. section 1985(3)?

II. Is opposition to abortion *per se* discrimination against women for purposes of "class animus" requirement of 42 U.S.C section 1985(3)?

III. Do purely private actors who hinder access to an abortion facility violate a federal constitutional right to interstate travel merely because some patrons of the facility come from out of state?

IV. Are Respondents' claims under 42 U.S.C. section 1985(3) so insubstantial as to deprive the federal courts of subject matter jurisdiction?

V. Are the phenomenally large and unconditional contempt fines levied against the petitioners for participating in sit-in demonstrations (from $25,000 to $100,000, totalling $375,000) criminal in character, thus requiring application of criminal due process protections?

PARTIES

The Petitioners are as follows: Reverend Robert Pearson, Reverend Jesse Lee, Joseph Foreman, Michael McMonagle, Jeff White, Christopher Slattery, B.O.R.N. Randall A. Terry, and Thomas Herlihy, & Operation Rescue.

The Petitioners were defendants and non-party contempt respondents in the district court and appellants in the court of appeals. The following were defendants in the district court and were appellants in the court of appeals but are not presently Petitioners: Adele Nathanson, Florence Talluto and Michael LaPenna. Contempt was not sought against defendant Reverend James P. Lisante.

The Respondents are as follows: Planned Parenthood Margaret Sanger Clinic (Manhattan); New York State National Organization for Women; New York State Chapter of the National Organization for Women; National Organization for Women; Religious Coalition for Abortion Rights-New York Metropolitan Area; New York State National Abortion Rights Action League, Inc.; Planned Parenthood of New York City, Inc.; Eastern Women's Center, Inc.; Planned Parenthood Clinic (Bronx); Planned Parenthood Clinic (Brooklyn); Ob-Gyn Pavilion; The Center for Reproductive and Sexual Heath; VIP Medical Associates; Bill Baird Institute (Suffolk); Bill Baird Institute (Nassau); Dr. Thomas J. Mullin, Bill Baird; Reverend Beatrice Blair; Rabbi Dennis Math; Reverend Donald Morlan and Pro Choice Coalition. The Respondents were each plaintiffs in the district court and appellees in the court of appeals.

An Intervenor in the district court was the Respondent City of New York, which pressed a state law public nuisance claim. The City of New York did not seek contempt citations against either the defendants or non-party Petitioners in the proceedings at issue in the courts below. The United States was a judgment

creditor (by virtue of the contempt fines) in the district court a creditor-appellee in the court of appeals.

Petitioners B.O.R.N. and Operation Rescue are not a corporations under Rule 28.1 of the Rules of this Court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

DECISIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

A. Course of Proceedings 4

B. Statement of Facts 5

REASONS FOR GRANTING THE WRIT 8

I. The underlying injunctive orders of the district court enforced by purportedly civil contempt fines and penalties rest on the identical legal grounds at issue in a case presently before this Court, *Jane Bray et al. v. Alexandria Women's Health Clinic, et al.*, No. 90-985 8

A. Federal Jurisdiction 8

B. The Right to Interstate Travel 11

C. Class Animus 13

TABLE OF CONTENTS (cont'd)

II. The Second Circuit Erroneously Held That The Contempt Fines Imposed by The District Court Were Civil in Nature 15

CONCLUSION 19

APPENDICES

Appendix A: Opinion of U.S. Court of Appeals for the Second Circuit, April 13, 1992, 961 F.2d 390 (2d Cir. 1992) A - 1

Appendix B: Temporary Restraining Order dated May 5, 1988 A - 28

Appendix C: Preliminary Injunction dated October 27, 1988 A - 32

Appendix D: Permanent Injunction dated January 10, 1989 A - 36

Appendix E: Opinion of U.S. District Court for the Southern District of New York, February 27, 1990, 732 F.Supp. 400 (S.D.N.Y. 1990) A - 40

Appendix F: Order assessing contempt fines against Petitioners, May 10, 1990 A - 92

TABLE OF CONTENTS (cont'd)

Appendix G:	Oral Bench Ruling of the U.S. District Court for the Southern District of New York, November 8, 1990	A - 95
Appendix H:	Order assessing contempt fines against Petitioner Christopher Slattery, November 8, 1990	A - 108

TABLE OF AUTHORITIES

CASES:

Attorney General of New York v. Soto-Lopes, 476 U.S. 898 (1986) 12

Bray v. Alexandria Women's Health Clinic, *cert. granted*, ____ U.S. ____, 111 S.Ct. 1070, 112 L.Ed. 2d 1176 (1991) (No. 90-985) . . . . passim

Califano v. Gautier Torres, 435 U.S. 1 (1978) 12

Crozer-Chester Medical Center v. Moran, 560 A.2d 133 (Pa. 1989) 19

Douglas v. First National Realty Corp., 543 F.2d 894 (D.C. Cir. 1971) 19

Doyle v. London Guarantee & Acc. Co., 204 U.S. 599, 51 L.Ed. 641, 644 . . . . . 16, 18

Dunn v. Blumstein, 405 U.S. 330 (1972) 12

Falstaff v. Miller, 702 F.2d 770 (9th Cir. 1983) 19

Gompers v. Buck's Stove & Range, 221 U.S. 418 (1911) 16

Griffin v. Breckenridge, 403 U.S. 88 (1971) 11

Hicks v. Feiock, 485 U.S. 624 (1988) 15, 16, 18

In Re Merchants' Stock & Grain, 223 U.S. 639, 32 S.Ct. 339, 546 L.Ed. 584 (1912) 17

TABLE OF AUTHORITIES (cont'd)

CASES: Page(s)

In re Stewart, 571 F.2d 958 (5th Cir. 1978) 19

Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) 12

Michaelson v. United States, 266 U.S. 42 (1924) 18

National Abortion Federation v. Operation Rescue, No. CV- 89-1181 (AWT) slip op. at 7 (C.D. Cal. January 31, 1990) 12, 14

New York State Nat. Org. for Women v. Terry, 704 F. Supp. 1247 (S.D.N.Y. 1989) 4

New York State Nat. Org. for Women v. Terry, 886 F.2d 1339 (2d Cir. 1989), *cert denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed. 2d 532 (1990) 4, 6, 16, 18

New York State Nat. Organization for Women v. Terry, 732 F. Supp. 400 (S.D.N.Y. 1990) . . . passim

New York State Nat. Org. for Women v. Terry, 961 F.2d 390 (2d Cir. 1992) . . . . . passim

Nye v. United States, 313 U.S. 33 (1941) 16, 18

Penfield v. Securities & Exchange Commission, 330 U.S. 585 (1947) 16, 18

Re Christian Engineering Co., 194 U.S. 458, 24 S.Ct. 729, 47 L.Ed. 1072 (1903) . . . 16, 17

TABLE OF AUTHORITIES (cont'd)

CASES: Page(s)

Shapiro v. Thompson, 394 U.S. 618 (1969) 12

Shillitani v. United States, 384 U.S. 364 (1966) 18

Thornburgh v. American Coll. of Obst. & Gyn, 476 U.S. 747 (1986) 19

U.S. Catholic Conf. v. Abortion Rights, 487 U.S. 72, 101 L.Ed. 2d 69 (1988) 9, 11

Union Tool v. Wilson, 259 U.S. 107 (1922) 16, 17

United Broth. of Carpenters and Joiners, Local 610 v. Scott, 463 U.S. 825 (1983) 11

United States v. Halper, 490 U.S. 435, 109 S.Ct. 1892 (1989) 15

United States v. Miller, 540 F.2d 1213 (4th Cir. 1976) 19

United States v. North, 621 F.2d 1255 (3rd Cir. 1980) 19

United States v. Spectro Foods, 544 F.2d 1175 (3rd Cir. 1976) 19

United States v. United Mine Workers, 330 U.S. 258 (1947) 9-11

Young v. U.S. Ex Rel. Vuitton Et Fils S.A., 481 U.S. 787 (1987) 15

TABLE OF AUTHORITIES (cont'd)

CASES: Page(s)

STATUTES:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 4

28 U.S.C. § 1343 4

42 U.S.C. § 1985(3) 2, 4, 8, 11, 14, 15

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992
NO. ____

Reverend Robert Pearson, et al.,

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v.

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DECISIONS BELOW

The two decisions of the district court resulting in two contempt judgments (Appendix F: A-92 to A-94 and Appendix H: A-108 to A-109) are reported in *New York State Nat. Organization for Women v. Terry*, 732 F. Supp. 400 (S.D.N.Y. 1990) (Appendix E: A-40 to A-91) and an unreported oral bench ruling which incorporates the first ruling (Appendix G: A-95 to A-107). The three underlying injunctive orders are included in the Appendix (A-28 to A-39). The appeals from these judgments were consolidated in the court of appeals. The

decision of the court of appeals was issued on April 13, 1992, and is reported at 961 F.2d 390 (2d Cir. 1992) (A1-A27).

JURISDICTION

The judgments of the district court for the Southern District of New York were entered on May 10, 1990 and November 8, 1990. The consolidated appeals involving the contempt fines in the United States Court of Appeals for the Second Circuit were decided on April 13, 1992. This Court has jurisdiction, under 28 U.S.C. section 1254(1) to review the judgment of the United States Court of Appeals. An order was issued by Associate Justice Clarence Thomas, Application No. A-10, on July 6, 1992, extending the time for filing this petition to and including August 11, 1992.

STATUTORY PROVISIONS

42 U.S.C. section 1985(3) provides as follows:

> If two or more persons in any State or Territory conspire to go in disguise on the highway or on the premises of another, for the purposes of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purposes of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified

> person as an elector for President or Vice President, or as a Member of Congress of the United States or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section; if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

Petitioners are eight individuals and two organizations, personally and morally opposed to abortion who, as participants in peaceful and non-violent public demonstrations, were made subject to severe and coercive civil contempt fines totalling $375,000 for alleged violations of the three injunctions.[1]

These phenomenally large fines levied against anti-establishment political protesters, for their participation in anti-abortion rescue demonstrations which have been found by the

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[1] The district court issued three injunctions upon which the contempt fines and penalties are based: a temporary restraining order dated May 5, 1988 (Appendix B: A-28 to A-31), a preliminary injunction dated October 27, 1988 (Appendix C: A-32 to A-35) and a permanent injunction dated January 10, 1989 (Appendix D: A-36 to A-39).

Second Circuit to be "a form of political speech,"[2] are a means of repressing civil protest that would have been enthusiastically endorsed by Bull Connor and the Jim Crow South.

Respondents have asserted two federal causes of action: First, a conspiracy to violate a right to travel under 42 U.S.C. section 1985(3); and second, a conspiracy to violate a privacy right to abortion, also under Section 1985(3). Respondents also asserted various pendant state causes of action including trespass. Intervenor Respondent City of New York asserted a public nuisance claim under state law and no federal claim. Federal jurisdiction in the district court was invoked under 28 U.S.C. sections 1331 and 1343.

A. Course of Proceedings

The district court had earlier issued a permanent injunction (A-36 to A-39) in this action.[3] Subsequently, the private Respondents brought orders to show cause for summary judgment of contempt against the defendants and various non-party Petitioners for participating in Operation Rescue demonstrations on May 6, 1988, October 29, 1988, January 13, 1989 and January 14, 1989, in alleged violation of the temporary

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[2] *New York State Nat. Org. for Women v. Terry*, 886 F.2d 1339, 1363 (2d Cir. 1989), *cert denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed. 2d 532 (1990).

[3] *New York State Nat. Org. for Women v. Terry*, 704 F. Supp. 1247 (S.D.N.Y. 1989) (granting a permanent injunction prohibiting the blocking of access to facilities that perform abortion), *aff'd as mod., New York State Nat. Org. for Women v. Terry*, 886 F. 2d 1339 (2d Cir. 1989) *cert. denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed. 2d 532 (1990) (affirming the district court's various underlying injunctive orders in the original action as modified to provide that previous contempt fines against plaintiffs Terry and Operation Rescue were to be paid into the court, not to the plaintiff National Organization for Women).

restraining order, preliminary injunction and permanent injunction.

The district court adjudged the Petitioners in contempt of its orders and levied fines purportedly for civil contempt totalling $375,000 and attorney's fees. The appeal of these huge fines and attorneys' fees was argued before the court of appeals for the Second Circuit on May 20, 1991, and decided on April 13, 1992.

B. Statement of Facts

The Petitioners in this case were defendants or non-parties whom the district court held in contempt and against whom $375,000 in contempt fines were assessed payable to the United States. *See*, Judgments at Appendices F, H (A-92 to A-94 and A-108 to A-109).

The district court acknowledged that the Petitioners had attacked the underlying injunctive orders in the contempt proceeding for lack of subject matter jurisdiction. 732 F. Supp at 400. (A-57). This attack was rejected by the district court (A-58) and the court of appeals, 961 F.2d at 396 (A-11 to A-14), which relied upon the earlier Second Circuit decision in *New York State Nat. Org. for Women v. Terry, supra*. Judge Sneed, visiting from the Ninth Circuit, noted in his terse concurring opinion that he joined in upholding subject matter jurisdiction only because of the strong views of the Second Circuit. 961 F.2d at 400 (A-23).

The district court found that the demonstrations in which the Petitioners participated had been organized by defendant Operation Rescue so that "protestors each day would converge on a facility where abortions were performed in an effort to close down the facility [and] . . . their purpose was to block the

doors so they cannot do abortions today". 732 F. Supp. at 393 (A-43), 405 (A-71).

In the earlier Second Circuit opinion, the circuit court recognized that the "defendants' actions clearly are a form of political speech protected by the First Amendment." 886 F.2d at 1363. The Second Circuit clearly acknowledged that the purpose of Operation Rescue demonstrations was to communicate the message "that abortion is wrong, immoral and must be stopped." 886 F. 2d at 1363.

As the United States has said in its Amicus Curiae Brief in Support of Petitioners' in *Bray* at p. 2-3:

> Petitioner Operation Rescue is an unincorporated association *with the principal goals of preventing abortions and ending the legalization of abortions*. Operation Rescue seeks to achieve these goals by, among other means, conducting "rescue" demonstrations at abortion clinics. . . During "rescue" demonstrations, petitioners obstruct the entrances to and exits from an abortion clinic, thereby effectively closing the clinic temporarily, preventing abortions from being performed for that period, and "rescuing" the fetuses that would otherwise have been aborted. Pet. App. 19a. The purpose of these demonstrations, as described in Operation Rescue's literature, is to "intervene between abortionists and the innocent victims," by "*physically* blockading abortion mills with [human] bodies." *Id.* at 20a (quoting *Operation Rescue, National Day of Rescue - October 29, 1988*. During such a demonstration, no person - male or female - is allowed by the

demonstrators to enter the clinic. (emphasis added).

For participation in one or more Operation Rescue demonstrations on May 6, 1988, October 29, 1988, January 13, 1989 and January 14, 1989, in the New York City area, the district court levied what it termed coercive civil contempt penalties and fines against the political protestors as follows:

Petitioner	Alleged TRO, Prel. or Perm. Injunction Violations	Unconditional Fines*
Rev. Jesse Lee	3	$100,000
Joseph Foreman	2	$ 25,000
Michael McMonagle	1	$ 25,000
Jeff White	1	$ 25,000
Rev. Robert Pearson	1	$ 25,000
Christopher Slattery	2	$ 25,000**
B.O.R.N.	1	$ 25,000
Randall A. Terry	3	$100,000***
Thomas Herlihy	1	$ 25,000
		$375,000

* 732 F. Supp. at 413-414 (A-89 to A-90); 961 F.2d at 394 (A-9). Fines were also assessed against non-petitioners Florence Talluto ($50,000 for 2 violations), Michael LaPenna ($25,000 for 1 violation) and Adelle Nathanson ($25,000 for 1 violation), for a total of $450,000.00. Talluto and LaPenna's fines were vacated by the court of appeals for lack jurisdiction due to improper service of the contempt papers. 961 F.2d at 398-400 (A-17 to A-21). Nathanson discontinued her appeal. Attorneys' fees were also assessed against all

contemnors by the district court and were upheld by the Second Circuit. 961 F.2d at 394-395 (A-7 to A-10).

** Slattery was fined $50,000, $25,000 of which was suspended.

*** Terry's and Operation Rescue's fines were joint and several.

It is these phenomenally large contempt penalties, and their attendant attorney's fees, that the Petitioners seek to have vacated by this Court.

REASONS FOR GRANTING THE WRIT

I. The underlying injunctive orders of the district court enforced by purportedly civil contempt fines and penalties rest on the identical legal grounds at issue in a case presently before this Court, *Jane Bray et al. v. Alexandria Women's Health Clinic, et al.*, No. 90-985

A. Federal Jurisdiction

Currently pending before this Court is the case of *Bray v. Alexandria Women's Health Clinic, cert. granted*, ____ U.S. ____, 111 S.Ct. 1070, 112 L.Ed. 2d 1176 (1991) (No. 90-985), which raises legal issues identical to those raised by Petitioners here.

In particular, Questions No. 4 in *Bray* is: "Are respondents' claims under *42 U.S.C. Section 1985(3)* so insubstantial as to deprive the federal courts of subject matter jurisdiction?" *Bray Pet. Cert.* at i. The "Questions Presented" section of this Petition contains the identical first four questions presented in the *Bray* case.

In view of the excessive monetary penalties assessed against the Petitioners, this Court should *either grant* and consider this case with *Bray or hold* this Petition pending this Court's decision in *Bray*. If this Court answers this fourth question in the affirmative, as the *Bray* Petitioners urge, then this Court can, without more, *either vacate and reverse* in their entirety the allegedly civil contempt judgments, fines and penalties assessed against the Petitioners in the case at bar *or vacate and remand* for further proceedings consistent with the *Bray* decision. As this Court has said in *United States v. United Mine Workers*, 330 U.S. 258, 195 (1947):

> The right to remedial relief falls with an injunction which events prove was erroneously issued . . . and a fortiori when the injunction or restraining order was beyond the jurisdiction of the court. . . If the Norris-LaGuardia Act were applicable in this case, the conviction for civil contempt would be reversed in its entirety. . . Assuming, then, that the Norris-LaGuardia Act applied to this case and prohibited injunctive relief at the request of the United States, we would set aside the preliminary injunction of December 4 and the judgment for civil contempt . . . (citations omitted).

The principle of allowing a non-party to defend a civil contempt citation by attacking the subject matter jurisdiction of the lower court to issue the order was recently affirmed in *U.S. Catholic Conf. v. Abortion Rights*, 487 U.S. 72, 101 L.Ed. 2d 69 (1988). In that case, the U.S. Catholic Conference of Bishops, a non-party, was held in civil contempt and fined $50,000 per day for disobeying a subpoena duces tecum to produce documents. The Catholic Bishops unsuccessfully challenged subject matter jurisdiction in the district court. The court of appeals limited the Bishops defense of the civil contempt

citation to the argument that "the district court lacked even colorable jurisdiction to hear the suit." 487 U.S. at 80. This Court reversed, holding that:

> When a district court elects to apply civil contempt to enforce compliance, it is consistent with that approach to allow full consideration of the court's subject-matter jurisdiction . . . Accordingly, on remand, the Court of Appeals must determine whether the District Court had subject-matter jurisdiction in the underlying action. If not, then the subpoenas duces tecum are void, and the civil contempt citation must be reversed "in its entirety." Mine Workers, supra, at 295, 91 L.Ed. 884, 67 S.Ct. 677. (487 U.S. at 79-80).

This Court forcefully stated:

> The right of a nonparty to appeal an adjudication of contempt cannot be questioned. . . Once the right to appeal a civil contempt order is acknowledged, arguments in its legitimate support should not be so confined that the power of the issuing court remains untested. . . The challenge in this case goes to the subject-matter jurisdiction of the court and hence its power to issue the order. The distinction between subject-matter jurisdiction and waivable defenses is not a mere nicety of legal metaphysics. It rests instead on the central principle of a free society that courts have finite bounds of authority, some of constitutional origin, which exist to protect citizens from the very wrong asserted here, the excessive use of judicial power. The courts, no less than the political branches of the

> government, must respect the limits of their authority. (487 U.S. at 76-77).

The court of appeals acknowledged that the district court could impose sanctions of civil contempt only if the 1985(3) claim was substantial. 961 F.2d at 395-396 (A-12 to A-14). If the non-party Petitioners in the case at bar and the *Bray* Petitioners are correct that the highly attenuated Ku Klux Klan Act claim of Respondents is insubstantial in a jurisdictional sense, then the purported civil contempt judgments with their fines and penalties "must be reversed in [their] entirety." *Catholic Conference*, 487 U.S. at 80. (quoting *United States v. United Mine Workers*). The three defendant Petitioners, Randall A. Terry, Operation Rescue and Thomas Herlihy, will benefit in the same manner if subject-matter jurisdiction is found to be lacking.

B. The Right to Interstate Travel

The most patently insubstantial aspect of the Respondents' purported federal claim under 42 U.S.C. Section 1985(3)[4] is the application of the right to interstate travel to Petitioners' anti-abortion demonstration activities. *See generally*

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[4] A *prima facie* case for relief under 42 U.S.C. Section 1985(3) must consist of alleging at least four necessary elements:

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the law; (3) an act of furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

United Broth. of Carpenters and Joiners, Local 610 v. Scott, 463 U.S. 825, 828-29 (1983) (restating the test first formulated in *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971)).

Brief Amici Curiae of Daniel Berrigan, S.J. et al. in the *Bray* case (containing thorough analysis of Supreme Court decisions on the right to travel and concluding that the claims are jurisdictionally insubstantial as foreclosed by the prior decisions of this Court). As a threshold matter, there is no right to travel case factually analogous to rescue demonstrations of the type involved in this case. Such decisions involve infringement of the right to travel by state action, principally through discriminatory residency requirements.[5] The right to travel in its classic meaning ensures new residents the same right to *vital governmental benefits and privileges* in the states to which they migrate as they are enjoyed by other residents. *Califano v. Gautier Torres*, 435 U.S. 1 (1978).

In analyzing rescue demonstrations, United States District Judge A. Wallace Tashima has commented: "Whatever other legal rights and liabilities may be implicated by such conduct, there in no federal privilege or immunity of one class of persons not to have another class of persons engage in non-violent, civil disobedience."[6]

As the *Bray* Petitioners assert in their Main Brief at p. 25-26:

> The implications of the holding of the court of appeals are astounding. Virtually every business located in a city situated near a state border (e.g., New York, Philadelphia, Washington,

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[5] *See e.g.*, *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969). *Attorney General of New York v. Soto-Lopes*, 476 U.S. 898 (1986).

[6] *National Abortion Federation v. Operation Rescue*, No. CV- 89-1181 (AWT) slip op. at 7 (C.D. Cal. January 31, 1990) (dismissing amended complaint with prejudice).

> D.C., Chicago, Portland, St. Louis, Minneapolis, and so forth), as well as every business located on a major interstate route or in the vicinity of a tourist site or commercial center, will serve numerous out-of-state customers on a regular basis. According to the holding of the court below, any sit-in or mass picketing at such a business would be a federal constitutional violation. . . This Court has never recognized a constitutional right to travel of such all-encompassing scope. . . The right to travel, however, is not an unlimited right to mere physical movement. . . . There is no general federal constitutional tort of obstruction of public or private passage.

See, Brief Amicus Curiae of United States in the *Bray* case at Section II. The right to interstate travel is not implicated where the Petitioners rescue demonstrations have only a *mere incidental effect upon travel*.

The application of the right to interstate travel to suppress traditional non-violent civil disobedience is nothing short of constitutional ambrosia - the creation of a federal cause of action where none exists.

C. Class Animus

In the court below, the finding that the class-based animus requirement was satisfied is premised upon a subset of gender: women seeking abortions. In rejecting this notion, United States District Judge A. Wallace Tashima has cogently

explained why this very class of "women seeking abortions" is not a class intended to be protected by the Ku Klux Klan Act[7]:

> The Court disagrees with the proposition that any "particular [sub]class of women," *id.*, is a protected class. For if the animus is directed at a particular class of women, then, by definition, it is not directed at other classes of women or at women as a class. If that is so, then the discrimination cannot be gender-based, it separates persons of the same gender from each other and, obviously, on a basis other than by gender. *The inquiry*, thus, *must be made without respect to gender, i.e.*, it is the *"seeking abortion" trait which animates the defendants' actions* and must be the basis for making the . . . [Section 1985(3)] analysis. (emphasis added).

As the United States argues in its *Bray* Amicus Curiae Brief at 15:

> Just as there is no gender-specific position concerning other moral questions, so, too, there is no specifically "male" or "female" point of view with respect to abortion. . . Respondents also overlook that a substantial number of women oppose abortion. That fact distinguishes this case from *Griffin v. Breckenridge*, in which there was no suggestion that a substantial number of blacks opposed granting blacks the right to vote. In other words, petitioners' anti-abortion demonstrations are not a form of

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[7] *National Abortion Federation v. Operation Rescue*, 721 F. Supp. 1168, 1170 (C.D. Cal. 1989).

gender based discrimination because they are aimed at a *practice*, not a type of *person*.

According to the Respondents, early American feminists, many of whom adamantly opposed abortion as the "murder of the innocents" would possess the requisite gender based animus for purposes of 42 U.S.C. Section 1985(3). *See generally*, Brief of Feminists for Life in America, et al, as Amici Curiae in the *Bray* case.

II. The Second Circuit Erroneously Held That The Contempt Fines Imposed by The District Court Were Civil in Nature

The fact that the lower courts have conveniently denominated their penalty civil coercive contempt is not controlling and should not be allowed to defeat applicable protections of federal constitutional law. *Hicks v. Feiock*, 485 U.S. 624, 631 (1988). The unconditional and punitive character of the court's contempt proceeding orders made the contempt criminal. *Hicks v. Feiock, supra*, 485 U.S. at 632-633. So did their irrational severity, 100 times the criminal fine for the same offense in the absence of any damage to Respondents.[8] *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 1901-1904 (1989). Since none of the due process protections, required in criminal proceedings, were afforded Petitioners, the contempt judgments must be reversed. *Young v. U.S. Ex Rel. Vuitton Et Fils S.A.*, 481 U.S. 787, 798-99 (1987).

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[8] The private Respondents during the contempt proceeding in the court below submitted arrest lists of some of the individual Petitioners, which lists show that they were charged with disorderly conduct, a violation, which carries a maximum fine of $250.00. See, New York Penal Laws, sections 240.25 and 73.

In the decision below, the court of appeals relied upon its prior decision in this case, *New York State National Organization for Women*, 886 F.2d at 1350-1351, which stated "[a]bsent the threat of imprisonment, the Constitutional due process protections generally are not required in a civil contempt proceeding." This analysis reveals the unorthodox view that due process protections are generally inapplicable to situations involving monetary sanctions. Nothing could be further from this Court's jurisprudence.[9]

The criminal nature of the contempt judgments is further revealed by their punitive quality (to vindicate the authority of the court), and not as "remedial, and for the benefit of the complainant." *Gompers v. Buck's Stove & Range*, 221 U.S. 418, 441 (1911). *Re Christian Engineering Co.*, 194 U.S. 458, 24 S.Ct.729, 47 L.Ed. 1072 (1903), involved the defendant's appeal of a $1,000.00 contempt fine in a patent suit for "disobedience of a preliminary injunction . . . . The fine was payable, one half to the United States and the other half to the complainant." 194 U.S. at 459. In explaining the criminal nature of the fine, this Court said:

> These authorities show that when an order imposing a fine for violation of an injunction is substantially one to reimburse the party injured by the disobedience, although called one in a contempt proceeding, it is to be regarded as merely an interlocutory order, and to be reviewed only on appeal from the final decree.

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[9] *Penfield v. Securities & Exchange Commission*, 330 U.S. 585, 592-595 (1947) (an unconditional $50.00 fine was a criminal sanction), *Union Tool v. Wilson*, 259 U.S. 107, 110 (1922), (a $2,500 fine payable to the court was a criminal sanction); *Nye v. United States*, 313 U.S. 33, 34 (1941) (unconditional fines payable to the United States carry the criminal hallmark); *Hicks v. Feiock*, *supra*.

> In the present case, however, the fine payable to the United States was clearly punitive and in vindication of the authority of the court, and, we think, as such, it dominates the proceeding, and fixes its character. 194 U.S. at 460, 461.

In *Re Merchants' Stock & Grain*, 223 U.S. 6[illegible], 32 S.Ct. 339, 56 L.Ed. 584 (1912), contempt fines totalling $3,500, imposed for disobedience of a preliminary injunction, payable 75% to the plaintiff and 25% to the United States, were held to be criminal in nature, relying on *Christian Engineering, supra.*

Citing both *Christian Engineering* and *Merchants Stock & Grain*, Justice Brandeis, in *Union Tool Co. v. Wilson*, explained that:

> Where a fine is imposed partly as compensation to the complainant and partly as punishment, the criminal feature of the order is dominant and fixes its character for purposes of review.

259 U.S. 107, 110 (1922). The instant contempt fines totalling $375,000, are not even a mixture of compensatory and punitive, but are payable solely to the United States. They are not compensatory; they are punitive and as such, criminal in nature.

The fact that the Second Circuit on its prior opinion, 886 F.2d 1339, modified the November 3, 1988, $50,000 Contempt Judgment, to be payable to the court (the United States) and not to the private Respondent N.O.W., reveals that the present contempt fines are clearly punitive in nature and not remedial and for the benefit of the complainant. Moreover, the fines are

clearly "intended as a deterrent to offenses against the public"[10] and "to punish the act of disobedience as a public wrong."[11]

Regarding unconditional versus conditional sanctions, this Court has often stated that a civil contempt sanction must have a mechanism whereby the contemnor can subsequently comply with the court's order and thereby purge himself of the contempt. *See, Shillitani v. United States*, 384 U.S. 364, 371 (1966); *Hicks v. Feiock, supra*; *Penfield v. Securities & Exchange Commission, supra*; *Doyle v. London Guarantee & Acc. Co.*, 204 U.S. 599, 51 L.Ed. 641, 644 ("compliance with the order relieves from payment."). When unconditional contempt fines were entered against the Petitioners, there was nothing the Petitioners could have done to purge themselves of the contempt. The judgments were therefore, *ipso facto*, criminal in nature.

The Second Circuit's reaffirmation (961 F.2d at 395 (A-12)) of its prior ruling (886 F.2d at 1350-1351) that the Petitioners' opportunity to comply with the order came *before* a violation occurred only manifests the invalidity of the Second Circuit's reasoning and suggests that due process is truly turned on its head when pro-life demonstrators are in the dock. The purge mechanism doctrine comes into play *after* a party is adjudged in contempt, so that the sanction is imposed with *conditions* which allow the contemnor to escape the sanction by compliance with the order. This case involves, however, violations of orders to refrain from prohibited action which

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[10] *Nye, supra*, 313 U.S. at 42.

[11] *Michaelson v. United States*, 266 U.S. 42, 65 (1924).

cannot be purged; the only appropriate response of a court is to punish past conduct, which is classic criminal contempt.[12]

These conditionality and purge mechanism requirements for civil contempt have been uniformly followed by other circuit courts,[13] as well as other Second Circuit decisions.[14] Apparently then, the only reason they were not applied here is the grim reality that in cases involving abortion rights, "a permissible reading of the [law] is to be avoided at all costs." *Thornburgh v. American Coll. of Obst. & Gyn*, 476 U.S. 747, 812 (1986) (White, J., dissenting).

CONCLUSION

For the foregoing reasons and those of the *Bray* Petitioners and their Amici Curiae supporters, the Petitioners pray that this Petition be granted and that the contempt

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12 *See also, Crozer-Chester Medical Center v. Moran*, 560 A.2d 133 (Pa. 1989) (contempt against anti-abortion protester adjudged to be criminal).

13 *Douglas v. First National Realty Corp.*, 543 F.2d 894 (D.C. Cir. 1971); *United States v. Miller*, 540 F.2d 1213 (4th Cir. 1976); *United States v. Spectro Foods*, 544 F.2d 1175 (3rd Cir. 1976); *United States v. North*, 621 F.2d 1255 (3rd Cir. 1980); *In re Stewart*, 571 F.2d 958 (5th Cir. 1978); *Falstaff v. Miller*, 702 F.2d 770 (9th Cir. 1983).

14 *In Re Grand Jury Witness*, 835 F.2d 437, 442 (2d Cir. 1987) *cert. denied sub nom. Armabulo v. United States*, 485 U.S. 1039 (1988) (stating a $50,000 fine was clearly criminal contempt); *U.S. v. Ayers*, 866 F.2d 571 (2nd Cir. 1989) (determinate sentence vacated because of absence of purge mechanism); *Hess v. New Jersey Transit Rail Operations, Inc.*, 946 F.2d 114 (2d Cir. 1988) (unconditional fine vacated).

judgments assessing $375,000 in fines with their attendant attorneys' fees, against the defendants and non-party Petitioners be *either vacated and reversed* in their entirety *or vacated and remanded* for further proceedings consistent with this Court's decision in *Bray*.

Dated: New Milford, CT.
August 11, 1992

Respectfully submitted,

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APPENDICES

APPENDIX A

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN; New York City Chapter of the National Organization for Women; National Organization for Women; Religious Coalition for Abortion Rights-New York Metropolitan Area; New York State National Abortion Rights Action League; Planned Parenthood of New York City, Inc.; Eastern Women's Center, Inc.; Planned Parenthood Clinic (Bronx); Planned Parenthood Clinic (Brooklyn); Planned Parenthood Margaret Sanger Clinic (Manhattan); OB-GYN Pavilion; The Center for Reproductive and Sexual Health; VIP Medical Associates; Bill Baird Institute (Suffolk); Bill Baird Institute (Nassau); Dr. Thomas J. Mullin; Bill Baird; Reverend Beatrice Blair; Rabbi Dennis Math; Reverend Donald Morlan; and Pro-Choice Coalition, Plaintiffs-Appellees,

and

The City of New York, Intervenor-Appellee,

and

United States of America
Creditor-Appelee,

v.

Randall A. TERRY; Operation Rescue; Reverend James P. Lisante; Thomas Herlihy; John Doe(s); Jane Doe(s), the last two being fictitious Names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein, Defendants,

Randall A. Terry; Operation Rescue;

and Thomas Herlihy,
Defendants-Appellants,

Jesse Lee; Joseph Foreman; Michael McMonagle; Jeff White; Florence Talluto; Michael LaPenna; Adelle Nathanson; Reverend Robert Pearson; Bistate Operation Rescue Network; and Christopher Slattery, Respondents-Appellants,

A. Lawrence Washburn, Jr.
Counsel-Appellant.

Nos. 1427, 1552, 1553, Dockets
90-6187, 91-6011, 91-6029.

United States Court of Appeals,
Second Circuit.

Argued May 20, 1991.

Decided April 13, 1992.

[392][1] Joseph P. Secola, New Milford, Conn. (A Lawrence Washburn, Jr., New York City, of counsel), for defendants-appellants, respondents-appellants (other than Christopher Slattery), and counsel-appellant.

Mary M. Gundrum, Center for Constitutional Rights, New York City (Alison Wetherfield, Ruth Jones, NOW Legal Defense & Education Fund, of counsel), for plaintiffs-appellees.

William P. Harrington, White Plains, N.Y. (Bleakley, Platt & Schmidt, of counsel), for respondent-appellant Christopher Slattery.

Gail P. Rubin, Asst. Corp. Counsel of the City of New York, New York City (Victor A. Kovner, Corp. Counsel of the City of New York, of counsel), for intervenor-appellee City of New York.

Nancy Kilson, Asst. U.S. Atty. for the Southern District of New York, New York City (Otto G. Obermaier, U.S. Atty. for the Southern District of New York, of counsel), for creditor-appellee U.S.

Before KEARSE, MAHONEY, and SNEED,* Circuit Judges.

MAHONEY, Circuit Judge:

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[1] Bracketed numbers indicate page numbers from decision reported at 961 F.2d 390 (2d Cir. 1992).

* The Honorable Joseph T. Sneed, Judge of the United States District Court for the Ninth Circuit, sitting by designation.

Defendants-appellants and respondents-appellants (other than Christopher Slattery) appeal[1] from an order entered May 10, 1990, and a final amended order entered July 9, 1990, of the United States District Court for the Southern District of New York, Robert J. Ward, Judge, that (1) adjudged them in civil contempt of orders and a permanent injunction previously entered by that court, (2) assessed contempt penalties against them in amounts ranging from $25,000 to $100,000, and (3) assessed attorneys' fees and costs against them in amounts ranging from $3,190.02 to $157,505.81. Respondent-appellant Christopher Slattery appeals[2] from an order and judgment [393] of that court entered December 26, 1990 that adjudged him in

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1 The appeals are complicated by various filings of notices of appeals followed by several vacaturs and reinstatements. After a careful review of the record, however, we are persuaded that all defendants-appellants and respondents-appellants, and counsel-appellant, are properly before us, except that respondent-appellant Bistate Operation Rescue Network has not perfected an appeal from the judgment entered against it on July 9, 1990 for $3,190.02 in attorneys' fees. We note that appeals have been noticed, presumably by inadvertence, on behalf of defendant Reverend James P. Lisante, against whom no order or judgment was entered, and respondent Bernard Nathanson, against whom no order or judgment was entered and whom the district court explicitly found not to have committed any civil contempt. *See* 732 F.Supp. at 406-07, 414. We note also that plaintiffs-appellees assert in their brief that respondent-appellant Adelle Nathanson has not taken an appeal, without contradiction by defendants-appellants and respondents-appellants in their reply brief or at oral argument. The record appears to indicate, however, that after stipulating to withdraw her then-pending appeal on January 24, 1991, respondent-appellant Adelle Nathanson filed a fresh notice of appeal on January 25, 1991.

2 The court's oral decision as to respondent-appellant Christopher Slattery was rendered November 8, 1990. He filed a notice of appeal on December 6, 1990, and the former order and judgment against him was entered December 26, 1990. His appeal is validated by Fed.R.App.P. 4(a)(2).

contempt of a preliminary injunction and a permanent injunction previously entered by that court, assessed a $50,000 contempt penalty against him, and stayed execution of judgment as to $25,000 on condition that Slattery commit no further violations of the injunctions. Counsel-appellant A. Lawrence Washburn, Jr. appeals from an amended final order of that court entered July 9, 1990 that assessed a sanction against him, pursuant to Fed.R.Civ.P. 11, in the amount of $11,712.47.

The appealed rulings are premised upon two published opinions, *New York State National Organization for Women v. Terry*, 732 F.Supp. 388 (S.D.N.Y. 1990) and *New York State National Organization for Women v. Terry*, , 737 F.Supp. 1350 (S.D.N.Y. 1990), and (as to respondent-appellant Christopher Slattery) an unpublished oral bench decision.

We reverse as to respondents-appellants Florence Talluto and Michael LaPenna and counsel-appellant; we otherwise affirm.

Background

Plaintiffs-appellees are organizations that favor legalized abortion, health clinics that perform abortions, a doctor who performs abortions, and three religious leaders. Defendants-appellants are three individuals Randall A. Terry, Reverend James P. Lisante, and Thomas Herlihy, and an organization, Operation Rescue, opposed to legalized abortion. Plaintiffs also "named as defendants 'John Does' and 'Jane Does,' intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of." *New York State Nat'l Org. for Women v. Terry*, 697 F.Supp. 1324, 1327 n. 2 (S.D.N.Y. 1988). That conduct is the prevention of access to facilities in the New York City Area performing abortions.

In *New York State National Organization for Women v. Terry*, 886 F.2d 1339, 1357-64 (2d Cir. 1989), *cert. denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed.2d 532 (1990) (*"Terry I"*), we affirmed a permanent injunction entered by the district court on January 10, 1989 against defendants' efforts to block access to abortion clinics in certain New York State counties because we concluded that those attempts violated 42 U.S.C. § 1985(3) (1988), as well as state trespass and public nuisance law. (The injunction provides for prospective civil contempt penalties of $25,000 per day for its violation, and each successive violation results in doubling of the sanction applicable to the contemnor. *See New York State Nat'l Org. for Women v. Terry*, 704 F.Supp. 1247, 1263-64 (S.D.N.Y. 1989)). We also affirmed an earlier ruling entered October 27, 1988, *see New York State Nat'l Org. for Women v. Terry*, 697 F.Supp. 1324 (S.D.N.Y. 1988), in which the district court held, *inter alia*, that: (1) defendants Terry and Operation Rescue were in contempt of that court's May 4 temporary injunction,[3] which also provided for $25,000 per day sanctions, and imposed contempt sanctions of $25,000 against each of them; and (2) discovery sanctions pursuant to Fed.R.Civ.P. 37(a)(4) would be imposed against defendants. *See Terry I*, 886 F.2d at 1350-57. We modified the district court's ruling, however, by directing that the contempt sanctions be paid to the court, rather than to plaintiff-appellee New York State National Organization for Women ("N.O.W."), which had provided "no evidence of actual injury [to N.O.W.] due to Operation Rescue's activities." 886 F.2d at 1354.

The district court's October 27, 1988 contempt ruling was "without prejudice to plaintiffs' right to proceed against defendants Herlihy and Lisante, or against any other individuals who violated the Court's Order with notice." *New York State*

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[3] *See* 697 F.Supp. at 1328. This injunction, adopted by the district court, was originally issued by the New York State Supreme Court, from which its action was removed. *See id.*

Nat'l Org. for Women v. Terry, 697 F.Supp. at 1338. Plaintiffs have since initiated contempt proceedings against various alleged participants in Operation Rescue's activities. *See New York State Nat'l Org. for Women* [394] *v. Terry*, 732 F.Supp. at 392-93. The demonstrators against whom plaintiffs sought contempt sanctions are the following organizations and persons: defendants-appellants Operation Rescue, Terry and Herlihy; respondent Bernard Nathanson; and respondents-appellants Bistate Operation Rescue Network ("B.O.R.N."), Jesse Lee, Joseph Foreman, Michael McMonagle, Jeff White, Florence Talluto, Michael LaPenna, Adelle Nathanson, Reverend Robert Pearson, and Christopher Slattery. *See id.* at 396 & n. 2.

Plaintiffs-appellees' contempt application relates to four days of demonstrations at various facilities performing abortions: May 6, 1988, October 29, 1988, January 13, 1989, and January 14, 1989. *See id.* at 398. On all these dates, Operation Rescue members held demonstrations at which they blocked access to abortion facilities. *See id.* at 394-95. At the May 6, 1988 demonstration, the terms of the May 4, 1988 temporary injunction were read aloud by the New York City police before arrests began. *See id.* at 394. Similarly, on January 13 and 14, 1989, police officers read the applicable permanent injunction to the demonstrators before initiating arrests. *See id.* at 395.

The district court found, with respect to defendants-appellants, that "all of the demonstrations at issue in these contempt proceedings were initiated and coordinated by Operation Rescue," *id.* at 389-99; Terry led the demonstrations, engaging in "purposeful conduct designed to violate the Court's orders," *id.* at 399; and Herliy participated in the May 6 demonstration with notice of the district court's order against him. *See id.* The district court: (1) adjudged Terry and Operation Rescue to be in civil contempt of its October 27, 1988 order and permanent injunction , and assessed penalties in the amount of $100,000 against each of them; and (2) adjudged

Herlihy to be in civil contempt of its May 4, 1988 order, and assessed a penalty in the amount of $25,000 against him. *See id.* at 413.

Contempt penalties were also assessed against respondents-appellants on the basis that "civil contempt sanctions may be assessed against nonparties who had actual notice of the [court's] orders in effect at the time in question and participated with defendants in violating those orders." *Id.* at 399-400. *See* Fed.R.Civ.P. 65(d) (order granting injunction "is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise"). After addressing and rejecting most of the respondents' arguments against the imposition of contempt sanctions, *see* 732 F.Supp. at 399-409, the district court found respondents-appellants in contempt of various of the court's orders and assessed contempt penalties

against them, as set forth in the margin.[4] The district court further ruled that: "Each of the contemnors is liable to plaintiffs for a pro rata share of the attorneys' fees and [395] costs incurred by plaintiffs as a result of bringing the contempt motion against him or her." 732 F.Supp. at 414. Finally, the district court granted plaintiffs-appellees' motion for the imposition of a Rule 11 sanction upon attorney A. Lawrence Washburn, concluding that "Washburn is liable to plaintiffs for the

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[4] The district court ruled as follows.

> Respondent B.O.R.N. is adjudged in civil contempt of this Court's October 27 Order and assessed coercive civil penalties in the amount of $25,000. Respondent Lee is adjudged in civil contempt of the Court's May 4 Order, October 27 Order and Permanent Injunction and assessed coercive civil penalties in the amount of $100,000. Respondent Foreman is adjudged in civil contempt of the Court's May 4, Order and Permanent Injunction and assessed coercive civil penalties in the amount of $25,000. Respondents McMonagle and White are adjudged in civil contempt of the Court's Permanent Injunction and assessed coercive civil penalties in the amount of $25,000. Respondent LaPenna is adjudged in civil contempt of the Court's May 4 Order and October 27 Order and assessed coercive civil penalties in the amount of $25,000. Respondent Talluto is adjudged in civil contempt of the Court's October 27 Order and Permanent Injunction and assessed coercive civil penalties in the amount of $50,000. Respondent Adelle Nathanson is adjudged in civil contempt of the Court's October 27 Order and assessed coercive civil penalties in the amount of $25,000. Respondent Pearson is adjudged in civil contempt of the Court's Permanent Injunction and assessed coercive civil penalties in the amount of $25,000. Respondent Bernard Nathanson is not adjudged in civil contempt.
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> 732 F.Supp. at 413-14. As to respondent-appellant Christopher Slattery, *see supra* note 2 and accompanying text.

attorneys' fees and costs they incurred as a result of filing their motion for sanctions and responding to his renewed cross-motion to dismiss." *Id.*

Subsequent to these rulings, the district court issued another opinion addressing plaintiffs' applications for attorney's fees and costs incurred as a result of: (1) litigating the main action,[5] (2) bringing the contempt proceedings, and (3) Washburn's violation of Rule 11. *See New York State Nat'l Org. for Women v. Terry*, 737 F.Supp. 1350 (S.D.N.Y. 1990). The district court granted all these applications, but reduced the dollar amounts from those sought by plaintiff-appellees (except as to the Rule 11 sanction against Washburn, which application was granted in full). *See id.* at 1358-67. Defendants-appellants were adjudged liable for attorneys fees and costs pursuant to section 1988 in the amount of $157,505.81; contemnors (including defendants-appellants) were assessed fees and costs in the total amount of $83,000.69. Rule 11 sanctions were assessed against Washburn in the amount of $11,712.47. *See id.* at 1367.

This appeal followed. *See supra* notes 1 and 2.

Discussion

A. *The Merits of Terry I.*

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[5] These fees were requested pursuant to 42 U.S.C. § 1988 (1988), which provides in pertinent part that:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fees as part of the costs.

Appellants devote the bulk of their appeal to a reargument of issues that this court decided in *Terry I.* They contend that women are not a valid "class of persons" for purposes of 42 U.S.C. § 1985(3);[6] we held to the contrary in *Terry I. See* 886 F.2d at 1358-59. They argue that even if women are a valid class, appellants' actions directed at the prevention of abortions did not amount to the class-based animus required for a violation of section 1985(3); we ruled to the contrary in *Terry I. See id.* at 1359-60. They argue that they did not violate any constitutional right to travel of persons seeking abortions; we held to the contrary in *Terry I. See id.* at 1360-61. They argue that the contempt fines imposed by the district court were criminal, rather than civil, in nature, and that appellants were not accorded procedural protections required in

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[6] Section 1985(3) provides in pertinent part:

> If two or more persons in any State ... conspire ... for the purposes of depriving, either directly or indirectly, *any person or class of persons* of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State ... from giving or securing to all peroses within such state ... the equal protection of the laws; ... in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Id. (emphasis added).

criminal contempt proceedings; we ruled to the contrary in *Terry I*. *See id.* at 1350-51. These issues are therefore settled in this circuit, absent reconsiderations in banc or a different ruling by the Supreme Court. *See, e.g. Leecan v. Lopes*, 893 F.2d 1434, 1443 (2d Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 2627, 110 L.Ed.2d 647 (1990).

[1] In addition, our determination in *Terry I* constitute the law of the case. This doctrine requires that we "adhere[] 'to [our] own decision at an earlier stage of the litigation' unless there are 'cogent or **[396]** 'compelling' reasons not to, such as 'an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'" *Sanders v. Sullivan*, 900 F.2d 601, 605 (2d Cir. 1990) (quoting *Doe v. New York City Dep't of Social Servs.*, 709 F.2d 782, 789 (2d Cir.), *cert. denied*, 464 U.S. 864, 104 S.Ct. 195, 78 L.Ed.2d 171 (1983)). No such reason is presented here, at least at this juncture in the litigation.

We note in this regard that the Supreme Court has granted certiorari and heard oral argument in *National Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990) (per curiam), *cert. granted sub nom. Bray v. Alexandria Women's Health Clinic*, ____ U.S. ___, 111 S.Ct. 1070, 112 L.Ed.2d 1176 (1991). In that case, the Fourth Circuit explicitly invoked *Terry I* for the proposition that "blocking access to medical services provided by abortion facilities which serve an interstate clientele violates the constitutional right to travel." 914 F.2d at 585. Even if the Supreme Court were to reverse the Fourth Circuit in *Bray*, however, it is unlikely that appellants could benefit form that ruling in this case.

The underlying injunctive orders pursuant to which contempt proceedings were brought against appellants were premised not only upon section 1985(3) but also upon the independent state law grounds of trespass and public nuisance.

See Terry I, 886 F.2d at 1361-62. (It is noteworthy in this regard that plaintiffs-appellees initiated this action in state court, and defendants-appellants removed it to federal court. *See supra* note 3.) Accordingly, the district court's actions can be sustained on these state grounds, which have not been separately challenged on this appeal, so long as the federal claim asserted by plaintiffs-appellees "ha[s] substance sufficient to confer subject matter jurisdiction on the court." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966) (citing *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 53 S.Ct. 549, 77 L.Ed. 1062 (1933)); *see Volunteer Medical Clinic, Inc. v. Operation Rescue*, 948 F.2d 218, 228 (6th Cir. 1991) (remanding for consideration whether injunction improperly premised upon alleged violation of section 1985(3) should be reinstated on state grounds of trespass, nuisance, or tortious interference with business); *Roe v. Operation Rescue*, 919 F.2d 857, 867-68 (3d Cir. 1990) (affirming injunction on unchallenged state grounds of trespass and intentional interference with contractual relations without addressing merits of section 1985(3) claim upon which injunction was also based).

Thus, only a federal claim that is "'so attenuated and unsubstantial as to be absolutely devoid of merit'" would preclude the district court's exercise of jurisdiction over the state trespass and public nuisance claims presented here. *Hagans v. Lavine*, 415 U.S. 528, 536-37, 94 S.Ct. 1372, 1378-79, 39 L.Ed.2d 577 (1974) (quoting *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 579, 24 S.Ct., 553, 557, 48 L.Ed. 795 (1904)). Given our ruling in *Terry I*, and the general state of the law on this issue, *see National Org. for Women v. Operation Rescue*, 914 F.2d at 585 (collecting cases), it appears clear that plaintiffs-appellees have asserted a substantial federal claim adequate to ground jurisdiction over the state trespass and public nuisance claims. This conclusion is subject, however, to the caveat that the petition for certiorari in *Bray v. Alexandria Women's Health Clinic* poses for review, *inter alia*, the question:

"Are respondents' claims under 42 U.S.C. 1985(3) so insubstantial as to deprive federal courts of subject matter jurisdiction?", 59 U.S.L.W. 3508 (U.S. Jan 21, 1991) (No. 90-985), and the grant of certiorari in *Bray* was not qualified regarding the questions to be considered by the Supreme Court. *See* ___ U.S. ___, 111 S.Ct. 1070, 112 L.Ed.2d 1176 (1991).

B. *Contentions of Respondents-Appellants Not Foreclosed by Terry I.*

Respondents-appellants, who were not parties to *Terry I*, have presented a number of arguments that are not foreclosed by *Terry I*, which we now address.

[397] 1. *Asserted Failure to Comply with Fed.R.Civ.P. 4(j).*

[2] Rule 43(a) of the Civil Rules of the United States District Court for the Southern District of New York provides that a "proceeding to adjudicate a person in civil contempt of court ... shall be commenced by the service of a notice of motion or order to show cause." Where the alleged contemnor has not yet appeared in the action, "service shall be made personally, in the manner provided for by the Federal Rules of Civil Procedure for the service of a summons." Id.

Respondents-appellants, upon whom service of orders to show cause was made as required by Rule 43(a), contend that they should be regarded as the unknown John Doe(s) and Mary Doe(s) named in plaintiffs-appellees' complaint, *see* Fed.R.Civ.P. 10(a); i.e., as defendants "presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein." They accordingly claim status as *defendants, rather than respondents*, in this case.

It follows, they argue, that service of the orders to show cause was required to comply with Fed.R.Civ.P. 4(j), which provides in pertinent part:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party of whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to the defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

Because they were not served with the orders to show cause "within 120 days after the filing of the complaint," or (as they alternatively contend in their reply brief) within 120 days of the demonstrations for which they were adjudged in contempt, respondents-appellants contend that plaintiffs-appellees "must begin their entire injunction case afresh against the Respondents, not having served them in time to participate in the case against the four known defendants."

Respondents-appellants cite *Napier v. Thirty or More Unidentified Federal Agents, Employees or Officers*, 855 F.2d 1080 (3d Cir. 1988), and *Rankel v. Greenburgh*, 117 F.R.D. 50 (S.D.N.Y. 1987), in support of this position, but these cases are not on point. *Napier's* only mention of rule 4(j) was in relation to the improper service of named, not fictitious, parties. *See* 855 F.2d at 1088 n. 4. Similarly, *Rankel* involved a motion to dismiss a named, not fictitious, party, and that motion was denied. *See* 117 F.R.D. at 54-55 & n 6.

We agree with the district court that "it is absurd to suggest that plaintiffs are forced to do the impossible: foretell which individuals will subsequently act in concert with

defendants in violation of an injunctive order of the Court and serve them within 120 days of filing the complaint." *New York State Nat'l Org. for Women V. Terry*, 732 F.Supp. at 403. We conclude that the time constraints of Rule 4(j) do not apply to service in connection with a contempt proceeding arising out of violation of injunctions validly issued pursuant to Fed.R.Civ.P. 65(d). We next address respondents-appellants' claim that the injunctive orders in this case were not so issued.

2. *Compliance with Fed.R.Civ.P. 65(d).*

[3] Respondents-appellants further contend that they were not "in active concert or participation" with defendants, as required by Rule 65(d), because their actions "were independently motivated" by their "political, social and moral positions on the subject of ... abortion." We have no reason to doubt this representation, but it is unavailing as an escape hatch from Rule 65(d). The rule is directed to the actuality of concert or participation, without regard to the motives that prompt the concert or participation.

[4,5] Respondents-appellants also contend that the district court's injunctions [398] failed to "set forth the reasons for [their] issuance" and, because some of the defendants were fictitiously named, were not "specific in terms" and did not "describe in reasonable detail ... the act or acts sought to be restrained," all as required by Rule 65(d). We disagree. The requirement of a statement of reasons "applies to the order granting the relief and does not require that the injunction itself set forth the reasons why the court granted the order." 11 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2955 at 539 (1973). Here, the district court issued an extensive opinion that set forth the reasons for the injunctions. *See New York State Nat'l Org. for Women v. Terry*, 704 F.Supp. at 1257-64. As to respondents-appellants' other contention, the naming of fictitious defendants did not render the injunctions

insufficiently precise because respondents-appellants had fair notice that acting in concert with the named defendants would subject them to contempt proceedings.

3. *Service upon Talluto and LaPenna.*

As noted earlier, Southern District Civil Rule 43(a) required that the order to show cause for the contempt motion be served upon respondents-appellants "personally, in the manner provided for by the Federal Rules of Civil Procedure for the service of a summons." Respondents-appellants Florence Talluto and Michael LaPenna contend that service upon them did not comply with this mandate.

The district court's order to show cause provided that if "plaintiffs are unable to effect personal service after two attempts, they may serve respondents at their last known address by Federal Express." *New York State Nat'l Org. for Women v. Terry*, 732 F.Supp. at 400. Respondents were so served.[7] The district court concluded that its order allowing such service was proper under Fed.R.Civ.P. 4(c)(2)(C)(i), which allows service upon individuals "pursuant to the law of the state in which the district court is held." *See New York State Nat'l Org. for Women v. Terry*, 732 F.Supp. at 400-01.

The pertinent law is N.Y.Civ.Prac.L. & R. 308 (McKinney 1990). The district court concluded that service was proper under paragraph 5 of § 308, which permits personal service upon a natural person "in such manner as the court, upon

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[7] Respondent-appellant Adelle Nathanson was also served in this manner, but no argument on this issue is advanced in her behalf on appeal. *See supra* note 1. The district court found that she had waived any objection to service, invoking Fed.R.Civ.P. 12(b)(5). *See New York State Nat'l Org. for Women v. Terry*, 732 F.Supp. at 400 n. 6.

motion without notice, directs, if service is impracticable under paragraphs one [personal service], two ['leave and mail' service[8]] and four ['nail and mail' service[9]] of this section." *Id.* § 308(5). The issue then, is whether personal, leave and mail, and nail and mail service were all "impracticable." *See Dobkin v. Chapman*, 21 N.Y.2d 490, 497-99, 236 N.E.2d 451, 455-56, 289 N.Y.S.2d 161, 167-68 (1968); *Dime Savings Bank of New York, FSB v. Mancini*, 169 A.D.2d 964, 964-65, 564 N.Y.S.2d 859, 859-60 (3d Dep't 1991); *Hitchcock v. Pyramid Centers of Empire State Co.*, 151 A.D.2d 837, 838-39, 542 N.Y.S.2d 813, 814-15 (3d Dep't 1989); *Giordano v. McMurtry*, 79 A.D.2d 548, 548-49, 433 N.Y.S.2d 583, 584 (1st Dep't 1980), *aff'd mem.*, 53 N.Y.2d 962, 424 N.E.2d 555, 441 N.Y.S.2d 668 (1981).

[399] LaPenna and Talluto argue that nail and mail was practicable. The district court disagreed, emphasizing that 'those who have glagrantly violated the court's orders are not

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[8] "Leave and mail" refers to:
delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and ... either mailing the summons to the person to be served at his or her last known residence or ... mailing the summons by first class mail to the person to be served at his or her actual place of business.
Id. § 308(2).

[9] "Nail and mail" refers to:
affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and ... either mailing the summons to such person at his or her last known residence or ... mailing the summons by first class mail to the person to be served at his or her actual place of business.
Id. § 308(4).

disposed to make themselves readily available for personal delivery of notice that they are to be prosecuted for contempt of those orders." *New York State Nat'l Org. for Women v. Terry*, 732 F.Supp. at 401 (quoting *Department of Housing Preservation & Dev. v. 24 West 132 Equities, Inc.*, 137 Misc.2d 459, 462, 524 N.Y.S.2d 324, 327 (App. Term 1st Dep't 1987), *aff'd mem.*, 150 A.D.2d 181, 540 N.Y.S.2d 711 (1st Dep't 1989), *appeal dismissed*, 74 N.Y. 2d 841, 545 N.E. 2d 872, 546 N.Y.S.2d 558 (1989), *cert. denied*, 493 U.S. 1078, 110 S.Ct. 1130, 107 L.Ed.2d 1035 (1990)). The district court thought that *Department of Housing* "suggested that the manner of service is sufficient if it is 'reasonably calculated under all the circumstances to apprise respondents of the pendency of the action.'" *New York State Nat'l Org. for Women v. Terry*, 732 F.Supp. at 401 (quoting *Department of Housing*, 137 Misc.2d at 462, 524 N.Y.S.2d at 327), and concluded that the service here was so calculated. *Id.*

We read *Department of Housing* differently. The "reasonably calculated" formulation stated by Appellate Term was addressed to the due process standard under the United States Constitution. This is made clear by the Appellate Term's citation, immediately following the quoted passage, of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950), where it is stated that: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action...." In *Department of Housing*, the contemnor was served by leave and mail, *see* 137 Misc.2d at 461, 524 N.Y.S.2d at 326, and the court emphasized that respondent had been served in accordance with "one of the methods delineated in [section 308]." *Id.* at 462, 524 N.Y.S.2d at 327. Accordingly, the service in *Department of Housing* complied with the constitutional standard *and* with section 308.

[6] In this case, by contrast, there was concededly no compliance with paragraphs 1, 2, and 4 of section 308, so the issue becomes the impracticability standard of paragraph 5. The district court found impracticability because plaintiffs presented evidence of the "practical difficulties" they would encounter in effectuating service "because of respondents' demonstrated disregard for the authority of the Court." *New York State Nat'l Org. for Women v. Terry*, 732 F.Supp. 401. This does not amount to a showing, however, that nail and mail service would not have been practicable.

As noted earlier, the district court's order to show cause allowed service by Federal Express at a respondent's "last known address" after two successful attempts at personal service. *See id.* at 400. Plaintiffs-appellees provided Federal Express with the names and last known addresses of LaPenna and Talluto. No reason appears why this information would not have sufficed for compliance with section 308(4); i.e., a mailing to the "last known residence" of LaPenna and Talluto, and affixation of the documents to the door of each's "actual place of business, dwelling place or usual place of abode." *Id.* The order to show cause did not require any showing that there was any confusion as to the residence or dwelling place of any respondent-appellant, i.e., any impracticability, before allowing a bypass of section 308(4).

[7] It was claimed at oral argument that the bulky motion papers involved could not practically have been "nailed" to any door, but section 308 requires only that they be "affix[ed]," and this may "be accomplished by use of a nail, tack, tape, rubber band or some other device which will ensure a genuine adherence." *Pacamore Bearings, Inc. v. Foley*, 92 A.D.2d 959, 960, 460 N.Y.S.2d 662, 664 (3d Dep't 1983). We conclude that, in the absence of any showing, or requirement of a showing, that nail and mail service was impracticable, service

under section 308(5) should not have been authorized by the district court.

[400] *See Dobkin*, 21 N.Y.2d at 497-99, 236 N.E.2d at 455-56, 289 N.Y.S.2d at 167-68; *Dime Savings Bank*, 169 A.D.2d at 964-65, 564 N.Y.S.2d at 859-60; *Hitchcock*, 151 A.D.2d at 838-39, 542 N.Y.S.2d at 814-15; *Giordano*, 79 A.D.2d at 548-49, 433 N.Y.S.2d at 584.

[8] When service is made pursuant to Fed.R.Civ.P. 4(c)(2)(C)(i), federal courts have no authority to stray from the requirements set by state law, here section 308, even if service in disregard of those requirements would still be constitutional. "[S]ervice of process must comply not only with constitutional requirements, but also with the provisions of the state statute." *FDIC v. Schaffer*, 731 F.2d 1134, 1136 (4th Cir. 1984). Numerous federal courts have refused to exercise jurisdiction over parties who were not served in accordance with the pertinent state statute. *See, e.g., Recreational Properties, Inc. v. Southwest Mortgage Serv. Corp.*, 804 F.2d 311, 314-15 (5th Cir. 1986); *Delta S.S. Lines, Inc. v. Albano*, 768 F.2d 728, 730 (5th Cir. 1985); *National Trust for Historic Preservation v. 1750 K Inv. Partnership*, 100 F.R.D. 483, 485-86 (E.D. Va. 1984), *aff'd mem.*, 755 F.2d 927, 929 (4th Cir. 1985); *Sun Sys. Prefabricated Solar Greenhouses, Inc. v. Venuti*, 596 F.Supp. 1516, 1517 (E.D.N.Y. 1984). Similarly, we conclude that the district court lacked jurisdiction over Talluto and LaPenna.

4. *The Rule 11 Sanction against Washburn.*

[9] The district court imposed a Rule 11 sanction upon counsel-appellant A. Lawrence Washburn, Jr. because he sought to renew a motion that asserted: (1) lack of subject matter jurisdiction over the underlying claims raised by plaintiffs in this action, (2) lack of subject matter jurisdiction because of the pending appeals[,] and (3) improper service of the Order to

Show Cause under Rules 4(c)(2)(C)(i) and (ii)." *New York State Nat'l Org. for Women v. Terry*, 732 F.Supp. at 409. The court concluded that resubmission of the motion amounted to "vexations conduct, which unduly delayed the adjudication of the contempt proceedings." *Id.* at 412.

The court previously invited renewal of the motion, which had originally been submitted upon inadequate papers, but cautioned that "in the event the motion is renewed *and denied as frivolous*, the Court would entertain a motion by plaintiffs for appropriate sanctions." *New York State Nat'l Org. for Women v. Terry*, 732 F.Supp. at 410 (emphasis added).

One of the grounds asserted in the motion has been determined on appeal not only to be nonfrivolous, but meritorious, resulting in reversal of the district court's ruling as to service upon Talluto and LaPenna. Thus, in view of the terms of the district court's invitation to resubmit the motion, it would be unfair and inappropriate to sanction Washburn for having done so, and we accordingly reverse the judgment imposing a Rule 11 sanction upon Washburn. *See Securities Indus. Ass'n v. Clarke*, 898 F.2d 318, 321-22 (2d Cir. 1990); *Motown Prods., Inc. v. Cacomm, Inc.*, 849 F.2d 781, 785-86 (2d Cir. 1988) (per curiam).

This result is consistent with our recent ruling in *Virgin Atl. Airways, Ltd. v. National Mediation Bd.*, 956 F.2d 1245, 1254-55 (2d Cir. 1992). In that case, we decided that it was not an abuse of discretion for the district court to impose Rule 11 sanctions upon a party that brought a motion (ultimately vindicated by our decision on appeal as meritorious) which was barred at that juncture in the district court by the law of the case doctrine, and also untimely under a local rule. Here, by contrast, Judge Ward invited resubmission of a motion that had not originally been presented on proper papers, and was thus initially denied without prejudice, but warned against an ultimate

determination that the motion was frivolous. The ensuing determination of frivolousness, and the accompanying sanction, cannot survive a ruling on appeal that a key ground of the motion was not only nonfrivolous, but in fact a correct statement of the pertinent law.

[401] Conclusion

We reverse the judgments against respondents-appellants Florence Talluto and Michael LaPenna, and counsel-appellant A. Lawrence Washburn, Jr.; we affirm the judgments of the district court in all other respects.

SNEED, Senior Circuit Judge,
Concurring Separately:

I concur in the court's reversal of the district court's orders directed at respondents-appellants Talluto, LaPenna, and counsel-appellant. I concur in Part A of Judge Mahoney's opinion solely because of the compelling force of the law of this circuit as set forth in *New York State National Organization for Women v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed.2d 532 (1990) (*"Terry I"*).

KEARSE, Circuit Judge, concurring and dissenting:

With all due respect, I dissent from so much of the majority opinion as reverses the district court's imposition of sanctions on defendants' attorney A. Lawrence Washburn, Jr. pursuant to Fed.R.Civ.P.11 for a frivolous motion for reargument. The basis of the reversal, *i.e.*, that the district court erred in deciding the underlying merits of one of the issues as to which reargument was sought, is contrary to our recent decision in *Virgin Atlantic Airways, Ltd. v. National Mediation Board*, 956 F.2d 1245 (2d Cir. 1992) (*"Virgin Atlantic"*). Further, even

if that were a permissible basis for reversal of a sanctions award, there were two other indisputably sound bases for the district court's imposition of sanctions, making it inappropriate for us to do more than vacate the imposition sanctions and remand to permit the district court to reconsider the matter of sanctions in light of our decision.

A. *The Service-of-Process Issue*

The motion that prompted the imposition of sanctions was threefold. It sought reargument of the district court's contempt order on the grounds of "(1) lack of subject matter jurisdiction over the underlying claims raised by plaintiffs in this action, (2) lack of subject matter jurisdiction because of the pending appeals[,] and (3) improper service of the Order to Show Cause under Rules 4(c)(2)(C)(i) and (ii).'" (Majority Opinion *ante* at 396). As to the third item, improper service, the fact that we have reversed the court's original decision does not mean that the sanctions award with respect to reargument must be reversed.

The imposition of Rule 11 sanctions is to be reviewed under an abuse-of-discretion standard. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S.Ct. 2447, 2461, 110 L.Ed.2d 359 (1990). In *Virgin Atlantic*, we held that though the court had erred on the merits of a certain question, it nonetheless had discretion to impose sanctions against a federal agency for an attempt to reargue the question on the sole basis of intervening decisions of a district court in another circuit. We recognized that the district court had imposed sanctions for the agency's attempt to reargue a decided issue on the basis of insufficient new support, "not ... for the substance of its motion." *Virgin Atlantic* at 1255.

In the present case, despite the district court's repeated admonitions that Washburn's motion required the presentation of

supporting affidavits and that frivolous filings could warrant sanctions, the motion to reargue lacked even the pretense of any new ammunition. (*See* Respondent's Memorandum Dated August 30, 1989, at 3: "[n]o new facts or affidavits are submitted and no new legal arguments are advanced".) Though the majority states that the district court "invited" the renewed motion, plainly the court did not invite it to be made on precisely the same papers as those on which it had just been denied. The district court's sanctions opinion, *New York State National Organization for Women v. Terry*, 732 F.Supp. 388 (S.D.N.Y. 1990) ("District Court Sanctions Opinion"), described the sequence. After rejecting counsel's original oral motion to dismiss on the grounds of improper service, "[t]he Court advised Washburn to submit a **[402]** motion in proper form, with supporting affidavits, if he wished to move to dismiss or quash service on behalf of respondents." *Id.* at 410. Counsel then submitted the motion in writing, but again without affidavits. In denying the written motion "without prejudice," "[t]he Court explained that the motion, as it was addressed to the issue of service, was inadequate in its present form, as there were no affidavits by any of respondents concerning service." Id. In connection with this explanation and again in granting an extension of time, the court cautioned that Rule 11 sanctions might be imposed if a renewed motion were frivolous. Nonetheless, in connection with Washburn's renewal of the written motion,

> "[n]o notice of motion was filed, nor were any supporting affidavits attached, despite the directive of the Court and the requirements of Civil Rule 3. No new arguments were advanced in the memorandum, with the exception of a section arguing that attorneys possess immunity from sanctions for their conduct, in a judicial proceeding and, therefore, that Rule 11 sanctions cannot be imposed upon them.

Id. Thus the court concluded that "[w]hile the Court does not impose sanctions lightly, an objective analysis of Washburn's conduct in resubmitting the motion without affidavits or additional support, and in substantially the same manner as it had been when previously denied by the Court, leads only to the conclusion that Washburn violated Rule 11." *Id.* at 412. On Washburn's motion to vacate the Rule 11 sanctions, the court stated that the "sanctions were not imposed for the filing of the original cross-motion, but only for the resubmission of the cross-motion without additional support." *New York State National Organization for Women v. Terry*, 737 F.Supp. 1350, 1366 (S.D.N.Y. 1990).

On this record, it is difficult for me to reconcile the majority's reversal of the imposition of sanctions against Washburn with either the abuse-of-discretion standard of review established by the Supreme Court in *Cooter & Gell* or with our Court's decision in *Virgin Atlantic*.

B. *The Other Reargument Grounds that Elicited Sanctions*

Even if reversal on the merits of the original motion were a basis for reversing an award of sanctions for a repetitive attempt to reargue, in the present case the sanctions order should not be reversed outright because it was based on two additional reargruments by Washburn on which defendants have not prevailed on appeal. First, Washburn renewed the argument that the court lacked subject matter jurisdiction of the action. As a matter of principle, since that question was then pending on appeal, the district court could not revise it. Second, he argued that the district court did not have the power to hold defendants in contempt because defendants had appealed from the entry of the injunction whose terms they had flouted. In light of the fact that defendants had twice tried, once in the district court and once in this Court, to obtain a stay of the injunction and had

twice been denied, defendant's renewed challenged to the court's power to hold them in contempt - like counsel's assertion that attorneys are immune from sanctions for frivolous court filings - was frivolous. Thus, on these two issues, the district court stated that "[t]he arguments advanced by Washburn were each previously rejected by the Court and, with the exception of the challenge to the manner of service ..., were each manifestly frivolous. When an attorney submits, or resubmits, a motion that he knew, or should have known, was meritless, Rule 11 sanctions are appropriate." District Court Sanctions Opinion, 732 F.Supp. at 412.

Imposition of sanctions on account of these frivolous challenges to the court's jurisdiction plainly was not an abuse of discretion. Accordingly, even if *Virgin Atlantic* did not exist as precedent, the most this Court could properly do is remand for the district court's consideration of whether to exercise its discretion to impose sanctions on these two bases alone, in light of the reversal on the merits of the service issue.

APPENDIX B

Temporary Restraining Order Dated May 5, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civ. 3071 (RJW)

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN, et al.,

Plaintiffs,

CITY OF NEW YORK,

Plaintiff-Intervenor,

-against-

RANDALL TERRY, et al.,

Defendants.

TEMPORARY RESTRAINING ORDER

Upon the affidavits submitted herein by plaintiffs, plaintiff-intervenor, and defendants, the exhibits attached thereto, the statement of stipulated facts, the summons and complaint, and all the papers and proceedings herein, and counsel for all

parties having appeared and argued before the Court on May 4, 1988, it is hereby

ORDERED that the temporary restraining order issued by Justice Herman Cahn on April 28, 1988, and modified by Justice Cahn on May 2, 1988, is hereby continued as modified as of 8:40 P.M. on May 4, 1988 by order of this Court on the record in open court, and as restated herein in full as follows:

It is hereby

ORDERED that the defendants, the officers, directors, agents and representatives of defendants, and all other persons whomsoever acting in concert with them, and with notice of this order are:

1) enjoined and restrained in any manner or by any means from:

a) trespassing on, blocking, or obstructing ingress into or egress from any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester Counties, from May 2, 1988 to May 7, 1988;

b) physically abusing or tortiously harassing persons entering, leaving, working at, or using any services at any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester Counties, from May 2, 1988 to May 7, 1988. Provided, however, that sidewalk counseling, consisting of reasonably quiet conversation of a nonthreatening nature by not more than two people with each person they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling and that if anyone who wants to, who is sought to be counseled wants to not have counseling, wants to leave, walk away, they shall have the absolute right to do that.

In addition, provided that this right to sidewalk counseling as defined here shall not limit the right of the Police Department to maintain public order by reasonably necessary rules and regulations as they decide are necessary at each particular demonstration site; and it is further

ORDERED that nothing in this Order shall be construed to limit defendants' exercise of their legitimate First Amendment rights; and it is further

ORDERED that defendants' failure to comply with this Order, shall subject them to civil damages of $25,000 per day for any violations of this Order; and it is further

ORDERED that security in the amount of $5,000.00 be posted by plaintiffs prior to May 6, 1988 at 5:00 P.M.; and further

ORDERED that any amounts collected thereunder shall be paid into the Registry of the Court to be disbursed by further order of the Court; and

Upon application of the City of New York, it is further

ORDERED that in addition to the $25,000 per diem amount ordered above, defendants shall be liable to pay any excess costs incurred by the City of New York as a result of defendants' failure to provide the City with advance notice of the location of their demonstration, unless defendants give the New York City Police Department twelve hours advance notice at the phone number provided to defendants' counsel in open court or the location of each day's demonstration.

Copies of this signed order shall be served upon the Financial Deputy in room 14 and the Clerk in room 18.

/s/ ROBERT J. WARD
Robert J. Ward

United States District Judge

Dated: New York, New York
May 5, 1988
9:45 A.M.

APPENDIX C

Preliminary Injunction Order
Dated October 27, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civ. 3071 (RJW)

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN, THE CITY OF NEW YORK, et al.,

Plaintiffs,

-against-

RANDALL TERRY, OPERATION RESCUE, THOMAS HERLIHY et al.,

Defendants.

ORDER

UPON the testimony of witnesses for plaintiffs and defendants heard before this Court on October 25 and 27, 1988, the affidavits submitted herein by plaintiffs, plaintiff-intervenor, and defendants, the exhibits attached thereto, the three statements of stipulated facts, the summons and complaint, and all the

papers and proceedings herein, and counsel for all parties having appeared and argued before the Court on October 25 and 27, 1988, it is hereby

ORDERED that the order issued by Justice Herman Cahn on April 28, 1988, modified by Justice Cahn on May 2, 1988, and modified by order of this Court on May 4, 1988, is hereby again modified by order of this Court, and as restated herein in full as follows:

It is hereby

ORDERED that the defendants, the officers, directors, agents and representatives of defendants, and all other persons whomsoever acting in concert with them, and with notice of this order (hereinafter "Operation Rescue or National Day of Rescue participants") are

1) enjoined and restrained in any manner or by any means from:

a) trespassing on, blocking, or obstructing ingress into or egress from any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester counties, on October 28, 29 and 31, 1988;

b) physically abusing or tortiously harassing persons entering, leaving, working at, or using any services at any facility at which abortions are performed in the City of New York; Nassau, Suffolk, or Westchester Counties, on October 28, 29, and 31, 1988. Provided, however, that sidewalk counseling, consisting of reasonably quiet conversation of nonthreatening nature by not more than two people with each person they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling and if anyone who wants to, who is sought to be counseled wants to

not having counseling, wants to leave, walk away, they shall have the absolute right to do that.

In addition, provided that this right to sidewalk counseling as defined here shall not limit the right of the Police Department to maintain public order by reasonably necessary rules and regulations as they decide are necessary at each particular demonstration site; and it is further

ORDERED that nothing in this Order shall be construed to limit Operation Rescue participants' exercise of their legitimate First Amendment rights; and it is further

ORDERED that the failure to comply with this Order by any Operation Rescue or National Day of Rescue participant with actual notice of the provisions of this Order shall subject them to civil damages of $25,000 per day for any violations of this Order; and it is further

ORDERED that any amounts collected thereunder shall be paid into the Registry of the Court to be disbursed by further Order of the Court; and

Upon application of the City of New York, it is further

ORDERED that in addition to the $25,000 per diem amount ordered above, Operation Rescue or National Day of Rescue participants shall be jointly and severally liable to pay any excess costs incurred by the City of New York as a result of Operation Rescue or National Day of Rescue participants' failure to provide the City with advance notice of the location of their demonstrations, unless Operation Rescue or National Day of Rescue Participants give the New York City Police Department

twelve hours advance notice of the location of each day's demonstrations.

/s/ ROBERT J. WARD
Robert J. Ward

United States District Judge

Dated: New York, New York
October 27, 1988
3:45 P.M.

APPENDIX D

Permanent Injunction dated January 10, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civ. 3071 (RJW)

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN, et al.,

Plaintiffs,

THE CITY OF NEW YORK,

Intervenor-Plaintiff,

-against-

RANDALL TERRY, et al.,

Defendants.

ORDER

UPON the undisputed facts in this case, supported by the affidavits, exhibits, and three statements of stipulated facts, the summons and complaint, and all papers and proceedings herein,

and counsel for all parties have appeared and argued before the Court on January 6, 1989, it is hereby

ORDERED that the defendants, the officers, directors, agents and representatives of defendants, and all other local organizations and persons whomsoever acting in concert with them, and with notice of this order (hereinafter "Operation Rescue participants") are:

1) permanently enjoined and restrained in any manner or by any means from:

a) trespassing on, blocking, or obstructing ingress into or egress from any facility at which abortions are performed in the City of New York, Nassau, Suffolk or Westchester counties;

b) physically abusing or tortiously harassing persons entering, leaving, working at, or using any services at any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester Countries; Provided, however, that sidewalk counseling, consisting of reasonably quiet conversation of a nonthreatening nature by not more than two people with each person they are seeking to counsel shall not be prohibited. Also provided that no one is required to accept or listen to sidewalk counseling and that if anyone who wants to, who is sought to be counseled wants to not have counseling, wants to leave, walk away, they shall have the absolute right to do that.

In addition, provided that this right to sidewalk counseling as defined here shall not limit the right of the Police Department to maintain public order by reasonably necessary rules and regulations as they decide are necessary at each particular demonstration site; and it is further

ORDERED that nothing in this Order shall be construed to limit Operation Rescue Participants' exercise of their legitimate First Amendment rights, and it is further

ORDERED that the failure to comply with this Order by any Operation Rescue participant with actual notice of the provisions of this Order shall subject him or her to civil damages of $25,000 per day for the first violation of this Order; and it is further

ORDERED that each successive violation of this Order shall subject the contemnor to a civil contempt fine double that of the previous fine; and it is further

ORDERED that any amounts collected thereunder shall be paid into the Registry of the Court to be disbursed by further Order of the Court; and it is further

ORDERED that each contemnor shall be jointly and severally liable for all attorneys' fees and related costs incurred by plaintiffs in relation to enforcement of this Order; and

Upon application of the City of New York, it is further

ORDERED that in addition to the per diem amount ordered above, Operation Rescue participants shall be jointly and severally liable to pay any excess costs incurred by the City of New York as a result of Operation Rescue participants' failure to provide the City with advance notice of the location of their demonstrations, unless Operation Rescue participants give the

New York City Police Department twelve hours advance notice of the location of each day's demonstrations.

/s/ ROBERT J. WARD
Robert J. Ward

United States District Judge

Dated: New York, New York
January 10, 1989

APPENDIX E

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN; New York City Chapter of the National Organization for Women; National Organization for Women; Religious Coalition for Abortion Rights-New York Metropolitan Area; New York State National Abortion Rights Action League, Inc.; Planned Parenthood of New York City, Inc.; Eastern Women's Center, Inc.; Planned Parenthood Clinic (Bronx); Planned Parenthood Clinic (Brooklyn); Planned Parenthood Margaret Sanger Clinic (Manhattan); OB-GYN Pavilion; The Center for Reproductive and Sexual Health; VIP Medical Associates; Bill Baird Institute (Suffolk); Bill Baird Institute (Nassau); Dr. Thomas J. Mullin; Bill Baird; Reverend Beatrice Blair; Rabbi Dennis Math; Reverend Donald Morlan; and Pro-Choice Coalition, Plaintiffs,

and

City of New York, Plaintiff-Intervenor,

v.

Randall TERRY; Operation Rescue; Reverend James P. Lisante; Thomas Herlihy; John Doe(s) and Jane Doe(s), the last two being fictitious names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein, Defendants.

No. 88 Civ. 3071 (RJW).
United States District Court,
S.D. New York,
Feb. 27, 1990.

[392][1] Center for Constitutional Rights (David Cole, Mary M. Gundrum and Rhonda Copelon, of counsel), Now Legal Defense and Educ. Fund (Alison Wetherfield and Sarah Burns, of counsel), and Rabinowitz, Boudin, Lieberman, Standard and Krinsky, P.C. (Judith Levin, of counsel), New York City, for plaintiffs.

Corp. Counsel for the City of New York (Peter Zimroth, Hilary Weisman and Lorna Goodman, of counsel), New York City, for plaintiff-intervenor.

Michael E. Tierney, New York City, and Rutherford Institute of Connecticut, Inc. (Joseph P. Secola, George J. Mercer, of counsel), Milford, Conn., for defendants.

A. Lawrence Washburn, Albany, N.Y., for defendants and respondents Florence Talluto, Michael McMonagle, Michael LaPenna and Jeff White.

John J. Broderick, Syosset, N.Y., for respondent Jesse Lee.

Kevin P. McGovern, Brooklyn, N.Y., for respondent Joseph Foreman.

Putney, Twombly, Hall & Hirson (John P. Hale, of counsel), New York City, for respondents Adelle and Bernard Nathanson.

Hogan & Traynor (Richard J. Traynor, of counsel), Morristown, N.J., for respondent Robert Pearson.

ROBERT J. WARD, District Judge.

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[1] Bracketed numbers indicate page numbers from decision reported at 732 F. Supp. 388.

Plaintiffs moved by order to show cause to hold certain defendants and other individuals and organizations acting in concert **[393]** with those defendants (collectively "respondents") in civil contempt of court for violating the temporary restraining order, the preliminary injunction and/or the permanent injunction in this action. These orders prohibited blocking access to medical facilities which performed abortions. Plaintiffs also seek to recover the costs and attorneys fees they incurred in bringing this contempt motion. A myriad of related motions have been filed by the parties to this proceeding and a previously denied cross-motion to dismiss the motion for contempt has been renewed by certain respondents. In response, plaintiffs filed a motion for the imposition of Rule 11 sanctions against attorney A. Lawrence Washburn ("Washburn"), claiming that the renewed cross-motion is frivolous. Plaintiffs also filed a motion to strike a portion of the record in the hearing conducted by the Court in these contempt proceedings, and for the imposition of sanctions pursuant to 28 U.S.C. § 1927, against attorney John P. Hale ("Hale"), counsel for respondents Adelle and Bernard Nathanson.

For the reasons that follow, the motion to hold defendants and respondents in civil contempt is granted in part and denied in part, the renewed cross-motion to dismiss is denied, the motion for the imposition of Rule 11 sanctions against Washburn is granted, and the motion to strike the record and impose sanctions on Hale is granted in part and denied in part.

BACKGROUND

Plaintiffs commenced this action in New York State Supreme Court on April 25, 1988, seeking injunctive and declaratory relief to restrain defendants from blocking access to

medical facilities providing abortions.[1] Defendants had organized and publicized a week of protests called "Operation Rescue" to be carried out in the New York City area from April 30 until May 7, 1988. According to defendants' plan, protestors each day would converge on a facility at which abortions were performed in an effort to close down the facility. The target facility each day was not to be disclosed in advance.

By order to show cause, plaintiffs sought to enjoin defendants, for the duration of the planned "Operation Rescue," from obstructing access to any facility at which abortions were performed in New York City and the surrounding counties. On April 28, 1988, a temporary restraining order ("TRO") was issued by Justice Cahn of the New York State Supreme Court, New York County, which did not expressly enjoin Operation Rescue from blocking access to health care facilities. On May 2, as a result of a demonstration in front of a physician's office at 154 East 85th Street in Manhattan where abortions are performed, a second TRO was issued by Justice Cahn that enjoined defendants from "trespassing on, blocking, obstructing ingress into or egress from any facility at which abortions are performed in the City of New York, Nassau, Suffolk or Westchester Counties from May 2, 1988 to May 7, 1988."

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[1] The history of this action is recounted in two prior published opinions of this Court, the first, dated October 27, 1988, and reported at 697 F.Supp. 1324 (1988) (holding defendants Randall Terry and Operation Rescue in civil contempt for violation of the Court's May 4, 1988 order), and the second, dated January 20, 1989, and reported at 704 F.Supp. 1247 (1989) (granting a permanent injunction prohibiting the blocking of access to facilities that perform abortion), as well as in the Second Circuit's opinion, dated September 20, 1989, and reported at 886 F.2d 1339 (2d Cir. 1989) (affirming the Court's various orders in this action as modified to provide that contempt fines were to be paid into the court, not to plaintiffs).

On May 3, 1988, Operation Rescue, led by Terry conducted a demonstration in front of a clinic in Queens, New York, during which several hundred demonstrators were arrested for blocking ingress to and egress from the clinic. Statement of Stipulated Facts, filed May 4, 1988 ¶¶ 3, 10. On the afternoon of May 3, 1988, Justice Cahn conducted a further hearing on the matter, during the course of which defendants removed the action to this Court. A hearing was scheduled to be conducted before this Court in the late afternoon of the following day, May 4, 1988.

After argument by the parties, this Court ruled on May 4, 1988, that it would adopt and continue Justice Cahn's May 2, **[394]** 1988 order, and would modify it by (1) adding coercive sanctions of $25,000.00 for each day that defendants violated the terms of the order, and (2) requiring defendants to notify the City in advance of the location of any demonstrations ("the May 4 Order"). This Court also ruled that failure to give such advance notice would make defendants liable for any resulting costs incurred by the City. Defendant Terry was notified of this Court's action by his attorney on the evening of May 4, and the Court signed the May 4 Order the following morning. Second Statement of Stipulated Facts, filed July 19, 1988 ¶ 1.

Defendants moved to vacate the May 4 Order for plaintiffs' alleged failure to comply with Rule 65(c), Fed.R.Civ.P. That motion was denied by this Court on May 6. Also on the same date, the Court of Appeals denied defendants' application for a stay of the May 4 Order pending appeal.

On Thursday morning, May 5, 1988, Operation Rescue demonstrators sat on the sidewalk in front of the Women's Choice Clinic, where abortions are performed, at 17 W. John Street, Hicksville, Long Island. The demonstrators blocked ingress to and egress from the clinic for approximately three hours. *Id.* ¶ 3.

On Friday morning, May 6, 1988, Operation Rescue demonstrators returned to the same site where they had demonstrated on Monday, May 2, at 154 East 85th Street, Manhattan, once again blocking access to the physician's office. *Id.* ¶ 4. Defendant Terry personally participated in physically blocking access to the abortion facility during the May 6 demonstration and was arrested. Third Statement of Stipulated Facts, filed July 26, 1988 ¶ 5. The terms of the May 4, Order were read aloud by the New York City police before arrests began. *Id.* ¶ 7.

At no time after he received notice of the May 4 Order did defendant Terry direct demonstrators to obey the Order, nor did he at any time alter his prior written instructions to Operation Rescue participants that their goal must be to block access to abortion facilities. *Id.* ¶ 6. Defendant Terry, however, communicated the terms of the Court's May 4 Order to the demonstrators at the May 6, 1988 demonstration. *Id.* Approximately 320 Operation Rescue demonstrators were arrested that day. *Id.* ¶ 7.

On May 31, 1988, plaintiffs sought civil contempt sanctions against defendants pursuant to Rule 70, Fed.R.Civ.P. and 18 U.S.C. § 401 (1982), as a consequence of the events of May 5 and 6. In an Opinion dated October 27, 1988 ("the October 27 Opinion"), the Court granted the motion, denied defendants' cross-motion to dismiss, and adjudged defendants Terry and Operation Rescue in civil contempt of the May 4 Order for their activities during the May 5 and May 6 demonstrations. 697 F.Supp. 1324, 1338. Accordingly, a judgment in the amount of $50,000.00 was entered by the Court holding Terry and Operation Rescue jointly and severally liable for $50,000.00 in civil contempt sanctions to be paid to plaintiff, National Organization for Women ("N.O.W."), and a judgment was entered in the amount of $19,141.00 in favor of the City for the costs that resulted from defendants' failure to provide

advance notice of either demonstration. The relief granted in the Court's October 27 Opinion was expressly "without prejudice to plaintiffs' right to proceed against defendants Herlihy and Lisante, or against any other individuals who violated the Court's Order with notice." 697 F.Supp. at 1338.

On October 7, 1988, plaintiffs moved to modify the Court's prior injunction to cover the dates October 28, 29 and 31, 1988, in response to defendants' publicized plan to conduct a "National Day of Rescue" at the end of October. At the conclusion of an evidentiary hearing conducted on October 25 and 27, 1988, the Court granted plaintiffs' motion and signed an order granting plaintiffs the modified preliminary relief they sought ("the October 27 Order"). Defendants' applications to this Court and to the Court of Appeals for a stay pending appeal of the October 27 Order were denied.

Notwithstanding the issuance of the modified preliminary injunction on October 27 and the denial of the requested stay, Operation Rescue organized and conducted **[395]** two demonstrations on the morning of October 29, 1988, within the geographical area covered by the October 27 Order. From at least 8:00 a.m. until about 12:15 p.m. on October 29, approximately 250 Operation Rescue demonstrators blocked ingress to and egress from the Women's Pavilion medical clinic on Ashford Avenue in Dobbs Ferry, New York. Exhibits A, H & I, annexed to Affirmation of Mary M. Gundrum, filed December 21, 1988 ("Gundrum Aff."); Exhibit 37, annexed to Declaration of Mary Gundrum, filed June 9, 1989 ("Gundrum Decl."). From at least 8:00 a.m. until about noon on October 29, approximately 130 Operation Rescue demonstrators blocked access to the Women's Pavilion medical clinic on Deer Park Avenue in Deer Park, Suffolk County, New York. Exhibits A & J, annexed to Gundrum Affidavit; Exhibit 37, annexed to Gundrum Decl. Both clinics provide abortions and family planning counseling.

On December 21, 1988, plaintiffs moved for summary judgment and a permanent injunction upon receiving notice of blockades planned by Operation Rescue in the New York City area from January 12 to 14, 1989. These blockades had been organized in express retaliation for this Court's October 27 Opinion. 697 F.Supp. 1324. *See* Exhibit A, annexed to Gundrum Aff. (Letter from Randall Terry, dated November 16, 1988, urging participation in January blockades of "abortion mills" in the New York City area in order to "face down" this Court). On January 6, 1989, the Court heard oral argument on plaintiffs' motion for summary judgment and defendants' motion to dismiss and, on January 10, 1989, the Court issued a permanent injunction that again enjoined defendants from blocking access to medical facilities offering abortion and included coercive sanctions of $25,000 per day for violations of the order (the "Permanent Injunction"). The Permanent Injunction was modified from the previous orders to provide that each successive violation of the injunction would result in doubling the civil contempt sanction applicable to the contemnor.

Notwithstanding the issuance of the Permanent Injunction, once again Operation Rescue organized and led demonstrations which blocked access to clinics offering abortion. On January 13, 1989, Terry and other Operation Rescue leaders led several hundred persons to block access to and from the Margaret Sanger Planned Parenthood Clinic at 380 Second Avenue in Manhattan, a facility that performs abortions (the "Margaret Sanger Clinic"). Exhibits 17 & 26, annexed to Gundrum Decl. Police Inspector James Helbock read the permanent injunction to the demonstrators using a bullhorn, before approximately 275 demonstrators were arrested. Exhibit 26, annexed to Gundrum Decl. Terry, using a bullhorn as well, instructed demonstrators to lock arms and prevent police officers from reaching the building entrance, and to engage in "total, complete non-cooperation" with the police. *Id.*

On January 14, 1989, Operation Rescue demonstrators again blocked all access to the Margaret Sanger Clinic. As happened during the previous day's demonstration, police officers read the Permanent Injunction to the demonstrators blocking access to the clinic before beginning arrests. Exhibits 28, 31, 26, 30 & 29, annexed to Gundrum Decl. Also on January 14, 1989, demonstrators blocked access to five other clinics in the New York City area which provide abortions. These demonstrations occurred at (1) the Manhattan Women's Medical Clinic, located at 115 East 23rd Street in Manhattan; (2) the VIP Medical Associates Clinic, located at 72 Fifth Avenue in Manhattan; (3) the Lincoln Women's Service Clinic, located at 1995 Broadway, Manhattan; (4) the Park Med Clinic, located on the 12th floor of 475 Park Avenue South in Manhattan; (5) the Eastern Women's Center, located at 38 East 30th Street in Manhattan. Exhibits 1, 31, 18, 33, 30, 29 & 21, annexed to Gundrum Decl. Operation Rescue claimed responsibility for organizing and conducting these demonstrations in literature it disseminated to its participants. Exhibit 1, annexed to Gundrum Aff.

On January 20, 1989, the Court issued an opinion granting plaintiffs' motion for summary judgment on their common law trespass **[396]** claim and on their 42 U.S.C. § 1985(3) federal cause of action and permanently enjoining Operation Rescue and its participants from blocking ingress into and egress from medical facilities providing abortion related services ("the January 20 Opinion").

Defendants appealed from the various orders entered by this Court. The Court of Appeals, in an Opinion dated September 20, 1989, affirmed this Court's ruling which, *inter alia*, (1) enjoined defendants from blocking access to clinics offering abortions, (2) held Terry and Operation Rescue in contempt of violation of the May 4 Order, and (3) imposed discovery sanctions on defendants. 886 F.2d 1339. The Court's

ruling regarding payment of the civil contempt sanctions was modified to provide that the coercive penalties for violations of the orders be payable into the Court, not to plaintiff N.O.W. 886 F.2d at 1353.

The instant motion for contempt

Plaintiffs' application for contempt relates to four days of blockades of facilities performing abortions: May 6, 1988, October 29, 1988, January 13, 1989, and January 14, 1989. Plaintiffs seek contempt sanctions against the following organizations and persons:

Defendants:

Operation Rescue
Randall Terry ("Terry")
Thomas Herlihy ("Herlihy")

Respondents:[2]

Bistate Operation Rescue Network ("B.O.R.N.")
Jesse Lee ("Lee")
Joseph Foreman ("Foreman")
Michael McMonagle ("McMonagle")
Jeff White ("White")

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[2] Two additional individuals, Dan Brusstar and John Hinshaw, were named in the Order to Show Cause as respondents, but were not included in plaintiffs' proof of service, filed July 13, 1989, and plaintiffs no longer argue that these individuals are subject to the instant contempt proceeding.

Christopher Slattery ("Slattery"), another individual originally named in the Order to Show Cause, was later served with a subsequent Order to Show Cause to hold him in civil contempt. Slattery has disputed certain facts concerning his alleged violation of the Court's orders, and this matter is currently pending before the Court.

Michael LaPenna ("LaPenna")
Florence Talluto ("Talluto")
Adelle Nathanson ("A. Nathanson")
Bernard Nathanson ("B. Nathanson")
Robert Pearson ("Pearson")

No facts were disputed by any of defendants, nor by respondents B.O.R.N., Lee, Foreman, McMonagle, White, LaPenna and Talluto.[3] Respondents B. Nathanson, A. Nathanson and Pearson, disputed the alleged facts concerning their knowledge of the Court's orders and their involvement in blocking access to clinics in concert with defendants. The Court commenced a hearing regarding the disputed facts on August 9, 1989. On August 9, 10, 15 and 16, 1989, the Court heard testimony and received evidence concerning the alleged roles these three respondents played in blocking access to clinics in concert with defendants and in violation of the Court's orders.

The Court will first discuss the appropriateness of imposing contempt sanctions against defendants and the objections they raise to these contempt proceedings. Second, the Court will examine the appropriateness of imposing sanctions against the various respondents. Third, the Court will consider the plaintiffs' request for attorneys' fees and costs associated with this application. Finally, the Court will address the motions for sanctions against attorneys Washburn and Hale.

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[3] Ordinarily a hearing is required before a court may award civil contempt sanctions. Where there are no material facts in dispute, however, no hearing is necessary. *United States v. City of Yonkers*, 856 F.2d 444, 453 (2d Cir. 1988) (need for plaintiffs to present evidence establishing defendants' contempt was obviated by undisputed representation that defendants had violated court's order); *Parker Pen Co. v. Greenglass*, 206 F.Supp. 796, 797 (S.D.N.Y. 1962); 11 C. Wright & A. Miller, *Federal Practice and Procedure, Civil* § 2960, at 590 (1973).

[397] · DISCUSSION

The Court of Appeals, in its decision in this case, clearly outlined the applicable law governing civil contempt proceedings.

> A court's inherent power to hold a party in civil contempt may be exercised only when (1) the order the party allegedly failed to comply with is clear and unambiguous, (2) the proof of noncompliance is clear and convincing, and (3) the party has not diligently attempted in a reasonable manner to comply.

886 F.2d at 1351; *E.E.O.C. v. Local 638, Local 28 of the Sheet Metal Workers' Int'l Ass'n*, 753 F.2d 1172, 1178 (2d Cir. 1985) *aff'd*, 478 U.S. 421, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986). It is not necessary to show that the party disobeyed the court's order willfully. *E.E.O.C. v. Local 638, Local 28 of the Sheet Metal Workers' Int'l Ass'n, supra*, 753 F.2d at 1178.

A. *Defendants*

The Court of Appeals, in upholding this Court's determination that Operation Rescue and Terry had violated the May 4 Order, rejected defendants' contention that the order was impermissibly vague.

> The [May 4 Order] was sufficiently clear as to what acts were proscribed. It prohibited trespass and obstruction that had the effect of blocking "ingress to and egress from any facility at which abortions are performed" within a specific geographic area. It barred physical abuse and tortious harassment of patients and employees. These prohibitions were balanced by language expressly permitting sidewalk counseling in a

> reasonably quiet and nonthreatening manner. [citation omitted] The conduct that lay between that which was prohibited and that which was permitted was sufficiently clear for defendants to ascertain precisely what they could and could not do. Therefore, the order was specific enough to serve as the foundation for a contempt citation.

886 F.2d at 1352.

The language of the October 27 Order and the Permanent Injunction pertaining to defendants' proscribed and permitted conduct was essentially unaltered from the language of the May 4 Order. Accordingly, these orders are sufficiently clear and unambiguous to satisfy the first prerequisite for a contempt citation against defendants.

Defendants challenge the propriety of conducting these contempt proceedings on three grounds. First, they assert that the Court lacks jurisdiction to enforce its orders because these order were pending on appeal at the time the contempt proceedings were commenced. To the extent that defendants maintain this argument after the Court of Appeals decision, it is meritless.

Plaintiffs' instant application for contempt does not require the Court to reconsider, reexamine, or alter any of its prior orders, as this application has never before been presented to the Court. Defendants sought and were denied several stays pending appeal. Having failed to obtain a stay, defendants cannot now argue that the Court is without power to enforce its own orders until the Court of Appeals has addressed their validity. *See National Service Industries, Inc. v. Vafla Corp.*, 694 F.2d 246, 250 (11th Cir. 1982) (argument that plaintiff may not execute upon judgment because case was on appeal, where

defendants did not obtain a stay pending appeal, bordered on the frivolous).

Second, defendants reassert their previously rejected argument that plaintiffs' motion for contempt is criminal, not civil, in nature because they allege it seeks to punish them for past conduct. This argument, resoundly repudiated by the Court of Appeals when put forth regarding the prior contempt proceedings against Operation Rescue and Terry, *see* 886 F.2d at 1351, is equally unavailing in these proceedings.

The demarcation between civil and criminal contempt is well-established. A sanction imposed to compel obedience to a lawful order of the court or to provide compensation to a complaining party is civil; a sanction imposed to punish for an offense against the public and to vindicate the authority of the court - not to provide private [398] benefits or relief - is criminal in nature. *Id.*

In each instance in which defendants are charged with knowing violation of the Court's orders, the particular order, including the coercive sanctions embodied within it, was issued prior to the alleged violative conduct. The May 4 Order, the October 27 Order and the Permanent Injunction forewarned defendants of the consequences of their actions should they choose to defy the Court's authority and block access to facilities which perform abortions in the New York City area. The ability to avoid the consequences of a violation of these orders was completely within the control of defendants, who had ample

opportunity to comply with their prohibitions.[4] The prospectively fixed penalties in each case were entirely conditional and coercive, plainly intended to coerce compliance with the Court's orders and to preserve the parties' then-existing rights. Therefore, the Court concludes that defendants activities on May 6, 1988, October 29, 1988, and January 13 & 14, 1989, are subject to civil contempt sanctions imposed by the Court in its May 4 Order, October 27 Order, and Permanent Injunction, respectively.

Defendants' final argument is that the Court should recuse itself pursuant to 28 U.S.C. § 455(b)(1) because, by chance, it observed part of the January 14, 1989 demonstration at the Margaret Sanger Clinic. Defendants argue that this observation raises the appearance of partiality by the Court.

Section 455(b)(1) provides that a judge "shall disqualify himself ... [w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."

The Court informed all parties, on the record, of its limited observations of this demonstration, made while the Court was coincidentally attending to private matters in the vicinity.

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[4] As the Court of Appeals explained in upholding the prior contempt finding against Operation Rescue and Terry:

> Faced on May 5, 1988 with a choice between compliance or noncompliance with the district Court's order, defendants chose the latter course.
>
> The factual determination of noncompliance - the assessment of whether the standards showing contempt were satisfied - and the resulting imposition of fines necessarily occurred after the defendants' ample opportunity to comply had come and gone. Thus, since the sanctions were imposed to compel obedience to a court order they are civil in nature.

886 F.2d at 1351.

See Transcript of Hearing, conducted June 9, 1989, at 6-9. The Court's observations did not include the identification of any specific group or individual among the demonstrators. *Id.* Because the fact that a demonstration occurred outside the Margaret Sanger Clinic on January 14, 1989 is not disputed by either defendants or respondents, there is simply no basis upon which to justify refusal under section 455(b)(1).

The objections raised by defendants with respect to the Court's ability to render a decision on the civil contempt application are rejected. The Court now turns to the undisputed facts to determine whether civil contempt sanctions shall be imposed.

Plaintiffs assert that Operation Rescue and Terry are each liable for $100,000.00 due to violations of the Court's October 27 Order and Permanent Injunction. This amount is derived as follows: (1) $25,000 for the demonstrations in violation of the October 27 Order at Deer Park and Dobbs Ferry, New York, on October 29, 1988; (2) $25,000 for the demonstration in violation of the Permanent Injunction at the Margaret Sanger Clinic on January 13, 1989, and (3) $50,000 for the demonstrations in violation of the Permanent Injunction at six New York City area clinics on January 14, 1989. Plaintiffs also assert that Herlihy is liable for $25,000 due to his participation in the demonstration in violation of the May 4 Order at 154 East 85th Street, Manhattan, on May 6, 1988.

1. Operation Rescue and Terry

The undisputed facts presented by plaintiffs indicate that all of the demonstrations [300] at issue in these contempt proceedings were initiated and coordinated by Operation Rescue. Operation Rescue literature and Terry called for a National Day of Rescue on October 29, 1988, and reported both the Dobbs Ferry and Deer Park demonstrations as part of the National Day

of Rescue. Exhibits A & B, annexed to Gundrum Aff.; Exhibit 37 annexed, to Gundrum Decl. Both Operation Rescue literature and Terry invited supporters to participate in the January demonstrations in New York City, and Operation Rescue literature subsequently claimed responsibility for these demonstrations. On January 12, 1989, two days after the issuance of the Permanent Injunction, a transcript of a television news show captured Terry talking with reporters regarding the next day's planned demonstration. Exhibit 23, annexed to Gundrum Decl. Terry coordinated and directed the demonstrators at the January 13, 1989 blockade, and instructed demonstrators to refuse to cooperate with the police. Exhibits 18, 20, 21, 19, 17 & 26, annexed to Gundrum Decl. On January 14, 1989, Terry once again led demonstrators to block access to the Margaret Sanger Clinic. Exhibit 21, annexed to Gundrum Decl. As the Court explained in its October 27 Order, Terry, as leader and organizer of Operation Rescue, is liable for civil contempt sanctions by virtue of his failure to alter his instructions to Operation Rescue participants that their goal was to block access to abortion facilities. As leader of the organization and of the particular activities that were enjoined, Terry had an affirmative duty to attempt to secure compliance by his rank and file. 697 F.Supp. at 1331. This duty was ignored by his purposeful conduct designed to violate the Court's orders and to encourage others to do so as well. *See* Exhibit A, annexed to Gundrum Aff. It is clear that Terry and Operation Rescue were not reasonably diligent in attempting to achieve compliance with the Court's orders. Indeed, the evidence demonstrates that Operation Rescue and Terry were diligent only in acting in direct contravention of these orders.

The undisputed facts are more than sufficient to satisfy plaintiffs' burden of proving by clear and convincing evidence that Operation Rescue and Terry violated the October 27 Order and the Permanent Injunction. Accordingly, Operation Rescue and Terry are each adjudged in civil contempt of the October 27

Order and the Permanent Injunction and are assessed coercive civil penalties, jointly and severally, in the amount of $100,000.

2. Herlihy

The undisputed facts establish that Herlihy participated in the May 6, 1988 demonstration and was arrested for blocking access to the physician's office, after rejecting the opportunity afforded by police to leave the area and comply with the May 4 Order. Plaintiffs assert Herlihy was personally served with the May 4 Order during the demonstration. Personal service of an order upon a party to an action, however, is not required. Parties are charged with a duty to monitor the progress of their cases and to ascertain the terms of any order entered against them. *Dole Fresh Fruit Co. v. United Banana, Inc.*, 821 F.2d 106, 109 (2d Cir. 1987); *Perfect Fit Inds., Inc. v. Acme Quilting Co.*, 646 F.2d 800, 808-09 (2d Cir. 1981). In addition, the May 4 Order was read by police to the demonstrators before police began making arrests. The evidence clearly and convincingly establishes that Herlihy knowingly violated the May 4 Order. Therefore, Herlihy is liable for coercive civil contempt sanctions in the amount of $25,000.

B. *Respondents*

Rule 65(d), Fed.R.Civ.P. provides an injunctive order of the court "is binding only upon the parties to the action; their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." Rule 65(d) prevents defendants from carrying out prohibited activity through others who have actual notice of the court's orders. *Regal Knitwear v. N.L.R.B.*, 324 U.S. 9, 14, 65 S.Ct. 478, 481, 89 L.Ed. 661 (1945). Thus, civil contempt sanctions may be assessed **[400]** against nonparties who had

actual notice of the orders in effect at the time in question and participated with defendants in violating those orders.

Respondents repeat the objections raised by defendants - that this Court lacks jurisdiction to preside over these contempt proceedings and that the imposition of sanctions against them for knowing violation of the Court's orders would be tantamount to criminal, not civil, contempt. Both arguments are rejected for the reasons stated in the previous section.[5]

Respondents also attack the validity of the underlying orders in this action by arguing that the Court's conclusion that plaintiffs presented a claim under 42 U.S.C. § 1985(3) was in error. This argument was rejected by this Court and Court of Appeals when raised by defendants, and is similarly without substance when voiced by respondents. *See* 886 F.2d at 1357-61, 704 F.Supp. at 1260. Therefore, even if respondents were in a position to challenge the validity of the underlying orders during a contempt proceeding against them, their challenge poses no impediment to imposing sanctions, if sanctions are warranted by their conduct. *See Donovan v. Sovereign Sec., Ltd.*, 726

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[5] If respondents had notice of the Court's orders, they stood in the same position as defendants with respect to their ability to avoid civil contempt sanctions by simply not violating these orders while acting in concert with defendants. The prospective sanctions in the orders were coercive and conditional as applied to respondents with actual notice, designed to secure future compliance. Thus, they are civil contempt fines. *See* 886 F.2d at 1351. Respondents' brash assertion that they should be allowed to act in concert with defendants in order to intentionally violate a court order which they had actual notice, while retaining impunity from the imposition of coercive sanctions fashioned to assure compliance with the order, is as groundless as it is insolent. Their repeated attempts to characterize this proceeding as one for criminal contempt conveniently ignore the numerous opportunities those respondents with actual notice of the orders had to comply with them, and thereby avoid any civil contempt penalties.

F.2d 55, 60 (2d Cir. 1984) (contemnors may not attack validity of underlying orders during contempt proceedings against them.).

Respondents offer a number of challenges to service of the Order to Show Cause for entry of summary judgment holding them in contempt. Personal service was effectuated upon respondents B.O.R.N., Lee, Foreman, White and B. Nathanson; "leave and mail" service was effectuated upon respondents McMonagle and Pearson, using the form of mail directed by the Court in the Order to Show Cause; and service was effectuated by Federal Express mailing as authorized by the Court in the Order to Show Cause upon respondents LaPenna, Talluto, and A. Nathanson. *See* Proof of Service of Order to Show Cause, filed June 13, 1989.

Respondents LaPenna and Talluto challenge this Court's provision in the Order to Show Cause that, if "plaintiffs are unable to effect personal service after two attempts, they may serve respondents at their last known address by Federal Express." This provision was perfectly proper.[6]

Rule 4(c)(2)(C)(i), Fed.R.Civ.P., allows service upon individuals "pursuant to the law of the state in which the district court is held...." *See Leab v. Streit*, 584 F.Supp. 748, 758-61 (S.D.N.Y. 1984). In New York State, service is permitted to be effected "in such manner as the court, upon motion without notice directs, if service is impracticable under paragraphs one [personal service], two [leave and mail service] and four [nail

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[6] A. Nathanson offered no challenge to the manner of service of the Order to Show Cause, filed opposition to the motion for contempt, and took part in the evidentiary hearing concerning her alleged violation of the Court's orders. Thus, she waived any objection to the service of the Order to Show Cause. *See* Rule 12(b)(5), Fed.R.Civ.P.; *Merz v. Hemmerle*, 90 F.R.D. 566, 568 (E.D.N.Y. 1981) (citing cases).

and mail service] of this section." New York State Civil Practice Law and Rules ("C.P.L.R.") § 308(5).

C.P.L.R. § 308(5) requires a showing of impracticability of other means of service, but does not require proof of due diligence or of actual prior attempts to serve a party under each and every method provided in the statute. *See Tremont Federal Savings* **[401]** *and Loan Assoc. v. Ndanusa*, 144 A.D.2d 660, 661, 535 N.Y.S.2d 8, 9 (2d Dep't 1988); *Saulo v. Noumi*, 119 A.D.2d 657, 658, 501 N.Y.S.2d 95, 97 (2d Dep't 1986); *Liebeskind v. Liebeskind*, 86 A.D.2d 207, 210, 449 N.Y.S.2d 226, 229 (1st Dep't 1982), *aff'd*, 58 N.Y.2d 858, 460 N.Y.S.2d 526, 447 N.E.2d 74 (1983). The meaning of "impracticability" is not capable of easy definition, and will depend upon the facts and circumstances of the particular case. *Markoff v. South Nassau Community Hospital*, 91 A.D.2d 1064, 1065, 458 N.Y.S.2d 672, 673 (2d Dep't 1983) (single attempt at service without any supporting documentation that service might be impracticable was insufficient to sustain service under section 308(5)). *See also Hitchcock v. Pyramid Centers of Empire State Co.*, 151 A.D.2d 837, 542 N.Y.S.2d 813 (3d Dep't 1989) (same).

In this case, plaintiffs were faced with the task of serving numerous nonparty respondents with an Order to Show Cause for a proceeding seeking to hold them in contempt and impose sanctions upon them. Evidence was presented by plaintiffs of the practical difficulties they would encounter in effectuating such service because of respondents' demonstrated disregard for the authority of the Court, as illustrated by *inter alia*, (1) prior contempt findings by other courts against many of respondents when similar orders enjoining the blocking of access to clinics were intentionally violated, (2) the statements of certain respondents, including Talluto, that they would not honor the Court's orders or pay any penalty for violating laws in relation to their actions in blocking access to clinics, and (3) their actions

in blocking access to clinics after the Court's orders had been read. *See* Exhibits 8, 9, 10, 13, 15, 37 & 34, annexed to Gundrum Decl.

The problems encountered with service of an order to show cause for contempt on nonparties have been specifically noted by the courts in New York. As the First Department explained:

> [i]n the particular context of contempts not committed in the immediate presence of the courts, it is frequently the case that those who have flagrantly violated the court's orders are not disposed to make themselves readily available for personal delivery of notice that they are to be prosecuted for contempt of those orders.

Dep't of Housing Preservation and Development v. 24 West 132 Equities, Inc., 137 Misc.2d 459, 462, 524 N.Y.S.2d 324, 327, (1987) *aff'd without opinion*, 150 A.D.2d 181, 540 N.Y.S.2d 711 (1989). The court suggested that the manner of service is sufficient if it is "reasonably calculated under all the circumstances to apprise respondents of the pendency of the action." *Id*. *See also Saulo v. Noumi*, *supra*, 119 A.D.2d at 658, 501 N.Y.S.2d at 97.

The manner of service authorized in the Order to Show Cause was reasonably calculated to apprise respondents of the pendency of the action, and required plaintiffs to endeavor to make at least two attempts at personal service prior to resorting to the Court sanctioned method of service, thus satisfying the impracticability requirement of section 308(5). *See Dashew v. Cantor*, 85 A.D.2d 619, 620, 445 N.Y.S.2d 24, 25 (2d Dep't 1981) (service under 308(5) authorized when defendant likely to attempt to evade service); *Tremont Federal Savings and Loan*

Assoc. v. Ndanusa, supra, 144 A.D.2d at 661, 535 N.Y.S.2d at 9.[7]

[402] Next, respondents White and McMonagle challenge the validity of extraterritorial service upon them under Rule 4(f), Fed.R.Civ.P. This argument is confused and misguided. Rule 4(f) provides for service "within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state." Rule 4(e), Fed.R.Civ.P., provides authority for extraterritorial limits of that state." Rule 4(e), Fed.R.Civ.P., provides authority for extraterritorial service in accordance with the law of the state in which the district court sits in the manner prescribed by state law. *Davis v. Musler*, 713 F.2d 907, 914 (2d Cir. 1983). *See Waffenschmidt v. Mackay*, 763 F.2d 711, 720 (5th Cir. 1985) (court has inherent power to enforce injunctive decrees lest court orders may be flouted, obstructed and violated with impunity, and Rule 4(f) does not bar extra-territorial service of an order to show cause for contempt), *cert. denied*, 474 U.S. 1056, 106 S.Ct. 794, 88 L.Ed.2d 771

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[7] Even if the Court were to find that the method of substitute service was not authorized by state law, there would be no need to dismiss the contempt proceedings against these respondents because they have shown absolutely no prejudice from the manner of actual service. Instead, service on La Penna and Talluto would be quashed, and plaintiffs would be directed to serve these respondents anew in one of the other manners set forth in section 308. *See* C. Wright & A. Miller, *Federal Practice and Procedure: Civil § 1354 (1969)*. As respondents have supported their argument by asserting that they are amenable to service, such a course of action would only unjustly delay these contempt proceedings where there is no serious contention that service did not do what it was intended to do, namely, give respondents notice of the pendency of the proceeding. *Cf. Feuntes v. Buser-American, Inc.*, No. 80 Civ. 4965, slip op. (S.D.N.Y. April 8, 1983); *Jones v. Building and Property Rehabilitation*, No. 81 Civ. 950, slip op. (N.D.N.Y. June 25, 1982); *Berhalter v. Irmisch*, 75 F.R.D. 539, 540 (W.D.N.Y. 1977).

(1986). Therefore, under the rubric provided by Rules 4(f) and 4(e), the Court must look to New York law to evaluate the adequacy of service on these respondents.

White and McMonagle do not dispute that they participated in demonstrating in New York, and the Court may exercise jurisdiction over them to determine whether they purposefully violated the Court's orders in concert with defendants. *See Waffenschmidt v. Mackay*, *supra*, 763 F.2d at 718-19; *Stiller v. Hardman*, 324 F.2d 626, 628 (2d Cir. 1963). New York State Judiciary law § 761 provides for service of an application for civil contempt, and nonresidents over whom the Court has jurisdiction may be served in accordance with the provisions of C.P.L.R. § 308. Plaintiffs complied with the requirements of section 308 by personally serving White and utilizing leave and mail service upon McMonagle.[8] This challenge to service of the Order to Show Cause is baseless.

Finally, respondents McMonagle, White, LaPenna and Talluto challenge the sufficiency of service of the Order to Show Cause pursuant to Rule 4(j) and 10(b), Fed.R.Civ.P.[9] They

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[8] The fact that the Order to Show Cause was mailed via Federal Express, as opposed to conventional mail, in no way undermines plaintiffs' compliance with the requirements of C.P.L.R. §308.

[9] Rule 4(j) provides, in pertinent part, that:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon ... motion.

Rule 10 provides, in part, that "[i]n the complaint the title of the action shall include the names of all the parties...."

argue that they should be considered named defendants in this action because plaintiffs used fictitious names in the complaint to stand for defendants whose identities were unknown. As defendants, this argument continues, they are not bound by the orders of this Court since they were not served with the complaint in the underlying action within 120 days after the case was removed, or the amended complaint was filed. While this argument may be appealing to respondents, from whose vantage point it appears as a safe harbor into which they can sail for protection from their violations of this Court's order, it flies in the face of the law and common sense and must be rejected.

Respondents were nonparties to the underlying action who allegedly acted in concert with defendants in violation of the Court's injunctive orders. Respondents were never named as parties to the underlying action, and are not now parties to that action.[10] The Court can conceive of no basis for equating the anonymous parties listed in the complaint with nonparties who are later alleged to have violated the Court's orders, with notice of these orders, in active concert with defendants. Respondents have offered none. Indeed, it cannot be seriously argued that the Court loses its power to enforce its valid injunctive orders **[403]** against nonparties acting in concert with defendants simply because more than 120 days pass from the time the complaint in the underlying action was filed. Nor can it be maintained that Rule 4(j) converts every possible contemnor into an indispensable party under Rule 19, Fed.R.Civ.P., who must be joined prior to adjudicating the controversy. Finally, it is absurd to suggest that plaintiffs are forced to do the impossible; foretell which individuals will subsequently act in concert with defendants in violation of an injunctive order of the Court and

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[10] Plaintiffs' use of fictional names in the complaint to denote unknown potential defendants was perfectly proper under the New York law. *Lowenstein v. Rooney*, 401 F.Supp. 952, 960 (E.D.N.Y. 1975).

serve them within 120 days of filing the complaint. Accordingly, Rule 4(j) is completely inapplicable to these respondents.

Respondents have offered no competent evidence disputing actual service of the Order to Show Cause, despite several admonitions from the Court to do so if they wished to continue to challenge the sufficiency of service. No factual affidavits were submitted by respondents. Respondents have not contested that they received actual notice of these proceedings and were afforded the opportunity to defend themselves from the claims asserted against them. Therefore, the challenges to the service of the Order to Show Cause are denied. The Court now turns to examine the specific orders as they relate to respondents, and the actions of the various respondents in concert with defendants.

1. The Language of the Orders Relating to Respondents

Plaintiffs assert that respondents Lee, Foreman, LaPenna, Pearson and A. Nathanson are each liable for $25,000 in civil contempt fines due to their blocking access to the physician's office at 154 East 85th Street in Manhattan on May 6, 1988, in concert with defendants and in violation of the May 4 Order.

The wording of the May 4 Order, however, while specifically warning defendants that they would be liable for sanctions in the amount of $25,000 in the event they violated the order, did not clearly extend this sanction to those acting in concert with them. The May 4 Order read, in pertinent part, that:

> defendants' failure to comply with this Order, shall subject them to civil damages of $25,000 per day for any violations of this Order.

The May 4 Order expressly included "all other persons whomever acting in concert with [defendants] with notice of [the] order' in its prohibition on blocking access to clinics. The express inclusion of those acting in concert with defendants was not carried over in providing that coercive sanctions were deemed appropriate as a means of securing compliance with the order. A reasonable reading of the May 4 Order, therefore, might lead to the conclusion that those acting in concert with defendants were not subject to the $25,000 sanction. The Court does not believe that the May 4 Order was sufficiently clear to give respondents adequate notice that they, as opposed to defendants, would be exposed to the $25,000 coercive penalty.

Accordingly, no fines will be assessed against respondents for their involvement in the May 6 demonstration.[11]

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[11] The unchallenged evidence demonstrates that respondents Lee, Foreman and La Penna acted in concert with defendants in violation of the May 4 Order, with actual notice of the order.

Lee was personally served with a copy of the May 4 Order by police while leading and directing the demonstration and wearing an armband with the inscription "O.R." Third Statement of Stipulated Facts, *supra*, ¶ 7. He was subsequently arrested for blocking access to the facility. *Id.*; Exhibit 36, annexed to Gundrum Decl. Foreman is the Southeast Regional Director of Operation Rescue. Foreman and La Penna participated in the Operation Rescue demonstrations on May 2, 3 and 6, and were arrested on each day. Exhibit 36, annexed to Gundrum Decl. The May 4 Order was read by police to demonstrators on May 6, 1988, and Terry informed the demonstrators of the terms of the May 4 Order. The police offered the demonstrators the opportunity to leave the area and comply with the order after reading the injunction and prior to beginning arrests. Third Statement of Stipulated Facts, *supra*, ¶ 7. This evidence is sufficient to establish that Lee, Foreman and La Penna had notice of the May 4 Order, had the opportunity to avoid violating that order, yet nonetheless acted in concert with defendants to intentionally defy that order. Accordingly, Lee, Foreman and La Penna are adjudged in civil contempt of the May 4 Order.

Both A. Nathanson and Pearson admit being part of the demonstration that blocked access to the office on May 6, 1988 and to being arrested for their activities. They both dispute, however, receiving notice of the May 4 Order. A Nathanson testified that she arrived late and did not hear the police officer or Terry read the May 4 Order to those blocking access to the clinic. Transcript of Argument and Evidentiary Hearing held on July 28, August 9, 10, 15 & 16, 1989 ("Tr."), at 555-557. Similarly, Pearson testified that he arrived late, after the police had read the injunction, but just in time to be arrested for blocking access to the office. Tr. 411, 532-33. The stories told by both respondents in disavowing notice of the May 4 Order were, at best, far-fetched. The disorder associated with arresting the hundreds of demonstrators that day, however, militates against finding their testimony so incredible as to be unbelievable given that plaintiffs were unable to produce any evidence directly placing either respondents at the demonstration while the injunction

(continued...)

[404] The October 27 Order and the Permanent Injunction remedied the ambiguity in the May 4 Order by explicitly providing that those individuals or organizations operating in concert with defendants with notice of the order would also be liable for coercive sanctions in the amount of $25,000 per day for any violations. For example, the October 27 Order provided that:

> defendants, the officers, directors, agents and representatives of defendants, and all other persons whomsoever acting in concert with them, and with notice of this order (hereinafter "Operation Rescue or National Day of Rescue participants") are:
>
> 1) enjoined and restrained.... ... and it is further
>
> ORDERED that the failure to comply with this Order by any Operation Rescue or National Day of Rescue participant with actual notice of the provisions of this Order shall subject them to civil damages of $25,000 per day for any violations of this Order.

Similarly, the Permanent Injunction defined Operation Rescue participants in the same manner as the October 27 Order, and provided that:

> the failure to comply with this order by any Operation Rescue participant with actual notice

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[11](...continued)

was read. Plaintiffs did not meet their burden of establishing that these respondents had notice of the May 4 Order. Accordingly, A. Nathanson and Pearson are not adjudged in civil contempt for their participation in the May 6, 1988 demonstration.

> of the provisions of this Order shall subject him or her to civil damages of $25,000 per day for the first violation of this Order, and it is further
>
> ORDERED that each successive violation of this Order shall subject the contemnor to civil contempt fine double that of the previous order.

Both provisions more than adequately warn those acting in concert with defendants that they will be subject to civil penalties of $25,000 per day for violations of these orders.[12]

Certain respondents next attack the language of the October 27 Order and the Permanent Injunction, arguing that, because all defendants were not specifically listed in the captions of these orders, the orders did not afford respondents sufficient notice as to when their actions in concert with others would expose them to the threat of civil contempt sanctions.[13] This argument is disingenuous. The caption of the October 27 Order

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[12] Likewise, the Permanent Injunction adequately apprises respondents of the consequences of successive violations of the Order.

[13] Additionally, respondents challenged the reasonableness of the $25,000 sanction. Both this Court and the Court of Appeals considered the amount of the coercive fines listed in the Court's orders and concluded that they were reasonable in relation the facts and circumstances of this case. *See* 886 F.2d at 1353; 704 F.Supp. at 1263-64; 697 F.Supp. 1332-34. Indeed, the persistent conduct of certain contemnors in continually violating the orders implies that the coercive sanctions may not be stringent enough to protect plaintiffs' rights. Neither defendants nor respondents provided the Court with any financial information upon which the burden of imposing the sanction on them might be evaluated, and this failure may not be charged against plaintiffs in determining the reasonableness of the fine. *See* 886 F.2d at 1353.

includes Terry, Operation Rescue, and Herlihy as named defendants; the caption of the Permanent Injunction lists Terry. There are numerous references throughout both orders to Operation Rescue and Operation Rescue participants, and it is undisputed that Operation Rescue coordinated and conducted **[405]** the various demonstrations at issue in these contempt proceedings. The terms of the orders with respect to nonparties acting in concert with defendants are more than sufficiently clear, at least with respect to acting in concert with Terry and Operation Rescue, to give a person of ordinary intelligence fair notice of what conduct is being proscribed. *See* 886 F.2d at 1352; *In re Baldwin-United Corp.*, 770 F.2d 328, 339 (2d Cir. 1985). Thus, the orders fully satisfied the specificity requirements of Rule 65(d). *See* 886 F.2d at 1351-52.

The Court will now examine respondents' conduct as it relates to the October 27 Order and the Permanent Injunction.

2. B.O.R.N.

Plaintiffs assert that B.O.R.N. is liable for $25,000 due to its involvement with the sponsorship of the demonstrations in Deer Park and Dobbs Ferry, New York on October 29, 1988, in violation of the October 27 Order. B.O.R.N. is a local group affiliated with Operation Rescue. Six of its leaders, including respondents Lee and LaPenna, signed a letter on B.O.R.N. letterhead calling on its members to participate in the "National Day of Rescue" called by Operation Rescue in October 1988. Exhibit G, annexed to Gundrum Aff.; Exhibit 37, annexed to Gundrum Decl. A rally, announced by a B.O.R.N. newsletter, was held on October 27, 1988, at which time Lee criticized the Court's preliminary injunction. Ex 19, annexed to Gundrum Decl. Lee led the demonstration in Dobbs Ferry, and LaPenna was arrested at the demonstration in Deer Park. Exhibits 19 & 14, annexed to Gundrum Decl. Plaintiffs have demonstrated with clear and convincing proof that B.O.R.N. had knowledge

of the October 27 Order and acted in concert with defendants to violate that order. Accordingly, B.O.R.N. is adjudged in civil contempt of the October 27 Order and is assessed coercive civil penalties in the amount of $25,000.

3. Lee

Plaintiffs assert that Lee is liable for $100,000 do to his active involvement with defendants in violating the Court's October 27 Order and the Permanent Injunction. This amount is computed as follows: (1) $25,000 for the demonstration in violation of the October 27 Order at Dobbs Ferry, New York on October 29, 1988, (2) $25,000 for the demonstration in violation of the Permanent Injunction at the Margaret Sanger Clinic on January 13, 1989, and (3) $50,000 for the demonstration in violation of the Permanent Injunction at the VIP Medical Associates Clinic in Manhattan (the "VIP Clinic") on January 14, 1989.

Lee, a leader of B.O.R.N., discussed the October 27 Order at a rally on October 1988, prior to leading the demonstration in Dobbs Ferry on October 29 which blocked access to the Women's Pavilion medical clinic as part of Operation Rescue's "National Day of Rescue". Exhibits 19, 18 & 37, annexed to Gundrum Decl.

Lee was personally served with a copy of the Permanent Injunction on or about January 12, 1989, at a meeting between police and Operation Rescue leaders. Exhibit 27, annexed to Gundrum Decl. Lee participated in the demonstration on January 13, 1989 which blocked access to the Margaret Sanger Clinic, during which time he described himself as an Operation Rescue leader, authorized to speak for the group, and stated that their purpose was "to block the doors so they cannot do abortions today." Exhibit 17, annexed to Gundrum Decl.

On January 14, 1989, Lee participated in the demonstration which blocked access to the VIP Clinic. Lee wore an armband with the inscription "O.R." and directed demonstrators in blocking the clinic door. Exhibit 18, annexed to Gundrum Decl. Lee used a bullhorn to lead songs when a police officer began to read the Permanent Injunction to the demonstrators. *Id.* After refusing to move, Lee was arrested. These undisputed facts definitively supply the requisite clear and convincing proof that Lee acted in concert with defendants in violating the Court's orders and blocking access to clinics, with knowledge of the October 27 Order and the Permanent Injunction. Consequently, Lee is adjudged in **[406]** civil contempt of the October 27 Order and the Permanent Injunction and is assessed coercive civil penalties in the amount of $100,000.

4. Foreman, McMonagle and White

Plaintiffs assert that Foreman, McMonagle and White are each liable for $25,000 due to their active involvement with defendants in violating the Permanent Injunction by participating in the demonstration at the Margaret Sanger Clinic on January 13, 1989. Both Foreman and McMonagle received notice of the Permanent Injunction by being served a copy of the order at a meeting on or about January 12, 1989, between the police and Operation Rescue leaders. Exhibit 27, annexed to Gundrum Decl. Foreman, McMonagle and White all participated in the January 13, 1989 demonstration that blocked access to the Margaret Sanger Clinic. McMonagle wore an armband with the inscription "O.R." and gave demonstrators instructions before and while they were being arrested. Exhibit 17, annexed to Gundrum Decl. White was present when the Permanent Injunction was read by the police, instructed demonstrators in blocking access to the clinic, and was arrested for his participation in the demonstration. Statement of Material Facts Not in Dispute, filed June 9, 1989.

The evidence clearly demonstrates that Foreman, McMonagle and White had notice of the Permanent Injunction yet, nonetheless, acted in concert with defendants to intentionally violate the Court's decree. Therefore, Foreman, McMonagle and White are each adjudged in civil contempt of the Permanent Injunction and are each assessed coercive civil penalties in the amount of $25,000.

5. Talluto and LaPenna

Plaintiffs assert that Talluto is liable for $50,000 for her active involvement with defendants in violating the October 27 Order and the Permanent Injunction: $25,000 for her participation in the demonstration at the Women's Pavilion clinic in Deer Park, New York on October 29, 1988 and $25,000 for her participation in the demonstration at the VIP Clinic in Manhattan on January 14, 1989.

Plaintiffs assert that LaPenna is liable for $25,000 for his active involvement with defendants in violating the October 27 Order by blocking access to the Women's Pavilion clinic in Deer Park, New York on October 29, 1988. LaPenna was one of the six leaders of B.O.R.N. who signed the letter calling on individuals to participate in the "National Day of Rescue" called by Operation Rescue for October 1988.

The October 27 Order was read to persons blocking access to the clinic from across the street by a number of counter demonstrators, before police began arresting the demonstrators. Exhibit 37, Annexed to Gundrum Decl. Both Talluto and LaPenna were arrested for blocking access to he clinic. Exhibits 15 and 39, annexed to Gundrum Decl.

On January 14, 1989, Talluto participated in a demonstration sponsored by Operation Rescue which blocked access to the V.I.P. clinic in Manhattan. Inspector James

Helbock read the Permanent Injunction to the demonstrators, before police began making arrests. Talluto was arrested that day for blocking access to the clinic.

The uncontroverted evidence is sufficient to establish that Talluto and LaPenna had notice of the October 27 Order and that Talluto had notice of the Permanent Injunction, yet both acted in concert with defendants to intentionally violate these orders. Accordingly, Talluto is adjudged in civil contempt and assessed coercive civil penalties in the amount of $50,000 and LaPenna is adjudged in civil contempt and assessed coercive civil penalties in the amount of $25,000.

6. B. Nathanson

Plaintiffs assert that B. Nathanson is liable for $25,000 for his active involvement with defendants in violating the Permanent Injunction by blocking access to the Margaret Sanger Clinic on January 13, 1989. B. Nathanson testified that he attended the Operation Rescue demonstration held at the Margaret Sanger Clinic on [407] January 13, 1989. Tr. 207-08. He was also present at an Operation Rescue rally the night before, where he was informed that Operation Rescue demonstrators would meet at an assembly point in midtown Manhattan, on the morning of January 13, 1989, and then proceed to an unspecified facility where abortions are performed. Tr. 204-06. B. Nathanson arrived at the designated assembly point and followed an Operation Rescue marshal to the site of what he knew to be an Operation Rescue demonstration in front of the clinic. Tr. 204-06, 208-09. He arrived at the demonstration between 7:00 and 7:30 a.m., Tr. 207, 584, and spent approximately three to four hours standing or sitting on the sidewalk near the front of the clinic. Tr. 201-03, 07.

Ellen Carton, an employee of the New York State affiliate of the National Abortion Rights Action League, testified

that she served B. Nathanson with a copy of the permanent injunction as he sat in front of the clinic that morning. Tr. 511-12. There was conflicting testimony presented regarding where B. Nathanson stood or sat for most of his time at the demonstration, with some evidence that he remained in the area in front of the clinic until approximately 8:00 a.m. Tr. 202-03, 245-47, 452, 467, 586-89. B. Nathanson, however, maintained that he remained on the periphery of the demonstration for most of his time there, outside of the main group of demonstrators blocking access to the clinic. Tr. 220-223, 589. The Permanent Injunction was read over a bullhorn by police at approximately 8:00 a.m., prior to their commencing arrests of demonstrators blocking access to the clinic. B. Nathanson was not arrested.

While the Court believes that the evidence presented regarding B. Nathanson's activities on January 13 indicates that he received notice of the injunction and was well aware of the purpose of the demonstration and Operation Rescue's sponsorship of the demonstration, it does not clearly and convincingly show that he acting concert with defendants to violate the Permanent Injunction. The Court notes: (1) a lack of clear evidence placing B. Nathanson in the area in front of the clinic for any length of time after he was apparently served with the injunction or after the police read the injunction, (2) his stated denial that he remained in this area, and (3) the failure of his conduct to result in his arrest, when hundreds of other demonstrators blocking access to the clinic were arrested. These factors militate against finding that plaintiffs have carried their burden of proving, by clear and convincing evidence, that he violated the Court's order. Accordingly, B. Nathanson is not adjudged in civil contempt for his actions on January 13, 1989.

7. A. Nathanson

Plaintiffs assert that A. Nathanson is liable for $25,000 due to her active involvement with defendants in violating the

October 27 Order by blocking access to the Women's Pavilion clinic in Dobbs Ferry on October 29, 1988. A. Nathanson testified that she sat on the steps in front of the clinic with the intention of blocking entrance and exit from the premises. Tr. 561, 267-68. In addition, she admitted that she was aware that on October 29, 1988, Operation Rescue had called for demonstrations across the country. Tr. 564-65. She testified that she was a "National Day of Rescue participant" and followed instructions from Operation Rescue marshals wearing Operation Rescue armbands. Tr. 263, 278, 430-31. Plaintiffs introduced a videotape of the demonstration which clearly shows that the entrance to the clinic was blocked by the demonstrators, and that A. Nathanson formed part of that blockade at various times during the demonstration. Hearing Exhibit 9 ("Ex 9").

A. Nathanson disputes receiving notice of the October 27 Order, but the evidence adduced at the hearing demonstrated that this assertion was not credible. Notice was given to the demonstrators in several ways that day. Kelli Conlin, the former president of the New York City chapter of N.O.W., testified that she read the October 27 Order through a bullhorn to the demonstrators at approximately 8:00 a.m. Tr. 432. At approximately 9:30 a.m., Lieutenant Perilli of the Dobbs Ferry police department, **[408]** while standing directly in front of the demonstrators, read the October 27 Order to them through a bullhorn. Ex. 9; Tr. 433-437. The demonstrators were quiet during both times that the injunction was read, Tr. 432-33; Ex. 9, and there was testimony that the words of the injunction were clearly audible from some distance away. Tr. 436-37, 443. The videotape of the demonstration clearly showed A. Nathanson blocking access to the clinic at approximately 9:10 a.m., after the first reading of the October 27 Order, at approximately 9:30 a.m., as Lt. Perilli finished reading the October 27 Order and at approximately 10:40 a.m., while counter-demonstrators could be heard chanting "enforce the injunction." Ex. 9.

A. Nathanson argues that she should not be found to have violated the October 27 Order because none of the demonstrators were arrested that day, and eventually they all left of their own volition. The lack of arrests, however, does not alter the fact that access to the clinic was blocked by Operation Rescue and National Day of Rescue participants, without permission, in violation of the October 27 Order. The evidence clearly and convincingly established that A. Nathanson acted in concert with defendants to block access to the clinic, received actual notice of the October 27 Order, yet did not cease her participation in the demonstration or refrain from blocking access to the clinic. Therefore, A. Nathanson is adjudged in civil contempt of the October 27 Order and assessed coercive civil penalties in the amount of $25,000.

8. Pearson

Plaintiffs assert that Pearson is liable for $25,000 due to his active involvement with defendants in violating the Permanent Injunction by blocking access to the VIP Clinic in Manhattan on January 14, 1989.[14] Pearson testified that he travelled from New Jersey on January 14, 1989, in order to participate in an Operation Rescue demonstration. Tr. 166, 535,

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[14] Pearson, in an untimely post-hearing submission, argues for the first time that plaintiffs failed to prove the VIP Clinic is a facility that offers abortions. This after-the fact assertion is groundless. The hearing was commenced to determine the disputed factual issues raised by respondents -- whether they had actual notice of the Court's orders and acted in concert with defendants in violation of these orders. Plaintiffs asserted that the VIP Clinic is a facility that performs abortions in the Statement of Material Facts not in Dispute, filed June 9, 1989. Pearson decided not to challenge this assertion. Indeed, his testimony at the hearing readily implies that he believes abortions are offered at the VIP Clinic, thus prompting the "rescue" demonstration . Tr. 535, 541, 548. He cannot now argue that his failure to contest whether the VIP Clinic offered abortions supplies a means to avoid the consequences of his own actions.

541. He arrived at the VIP Clinic before 8:00 a.m. on January 14, 1989. Tr. 164-65. A police videotape of the demonstration was introduced at the hearing, which shows that the Permanent Injunction was read to the crowd of demonstrators blocking access to the clinic by a police officer. Hearing Exhibit 1 ("Ex. 1") Pearson is clearly visible in the videotape, standing inside a police barricade, only a few feet away from the police officer who was standing on the other side of the barricade, as the officer read the Permanent Injunction with the aid of a bullhorn. *Id.* After the officer announced he was about to read the injunction, the demonstrators began singing. *Id.* Pearson testified that singing during the reading of court orders is standard procedure for demonstrators participating in "rescues" in which they block access to clinics performing abortions, and that he believed that was exactly what was happening on January 14, 1989. Tr. 538.

Copies of the Permanent Injunction were distributed to demonstrators sitting or standing in front of the doors of the VIP clinic. Tr. 503. Another videotape was introduced by plaintiffs which shows a uniformed police officer handing a set of papers, identified as a copy of the permanent injunction, to Pearson as he stood inside the police barricades, blocking access to the clinic. Hearing Exhibit 5 ("Ex. 5"); Tr. 503, 408.

After the injunction was read, and after being served with a copy of the injunction, **[409]** Pearson nevertheless remained standing in front of the clinic with other Operation Rescue demonstrators, blocking access to the door, and at one point linking arms with other demonstrators to form a more effective human barricade. Ex. 5; *See* Tr. 390. The police arrested Pearson for his activities in blocking access to the clinic that day. Tr. 168.

The evidence presented to the Court was overwhelming that Pearson had notice of the Permanent Injunction, yet

nonetheless acted in concert with defendants in violating the order by blocking ingress to and egress from the VIP Clinic on January 14, 1989. Pearson's protestations that he had no notice of the injunction are clearly belied by the videotapes and the other evidence submitted at the hearing, and are simply not credible.[15] Accordingly, Pearson is adjudged in civil contempt of the Permanent Injunction and assessed a coercive fine in the amount of $25,000.

C. *Attorneys' Fees and Costs*

Plaintiffs seek attorneys' fees and costs from each contemnor to compensate them for their expenditures in bringing on the motion for contempt. Civil contempt sanctions may serve either to coerce the contemnor into future compliance with a court's order or to compensate the complainant for losses resulting from the contemnor's past noncompliance. 886 F.2d at 1352. The $25,000 fines were coercive sanctions designed to ensure compliance with the Court's orders. In addition, the Permanent Injunction expressly warned "that each contemnor shall be jointly and severally liable for all attorneys' fees and related costs incurred by plaintiffs in enforcing this Order. "This additional penalty can likewise be viewed as a coercive fine designed to ensure compliance.

Moreover, where respondents have "responded with callous indifference to [their] obligations under the order," not only are coercive sanctions justified, but also costs and attorneys' fees. *N.A. Sales Co., Inc. v. Chapman Industries Corp.*, 736 F.2d 854, 858 (2d Cir.1984); *See also Hutto v. Finney*, 437 U.S. 678, 689 n. 14, 98 S.Ct. 2565, 2573 n. 14, 57 L.Ed.2d 522 (1978); Rule 43(a), Civil Rules of the United States Courts

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[15] In any event, conscious disregard of notice of the Permanent Injunction will not suffice to provide immunity for actions then taken in direct violation of that order.

for the Southern and Eastern Districts of New York ("Civil Rules") ("A reasonable counsel fee, necessitated by the contempt proceedings, may be included as an item of damage.")

An award of attorneys' fees and costs serves the compensatory purpose of civil contempt and avoids penalizing the complainant who is protected by the order, for the actions of contemnors who purposefully violate that order. *See Local 28 of the Sheet Metal Workers' Int'l Assoc. v. E.E.O.C.*, 478 U.S. 421, 444 n.23, 106 S.Ct. 3019, 3033 n. 23, 92 L.Ed.2d 344 (1986); *Vuitton et Fils, S.A. v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir.1979) (if the violation of the court's order is willful, compensatory damages to the complainant should include reasonable costs for prosecuting the contempt, including attorneys' fees). The evidence more than adequately demonstrates the intentional violation of the three orders of this Court by the various defendant and respondent contemnors. Accordingly, each defendant and respondent who violated the May 4 Order, the October 27 Order and/or the Permanent Injunction is liable for the attorneys' fees and costs incurred by plaintiffs as a result of bringing the contempt motion against him or her.

D. *The Rule 11 Motion Against Washburn*

On July 14, 1989, certain respondents, through attorney Washburn, filed a memorandum opposing the Order to Show Cause. The memorandum raised three arguments: (1) lack of subject matter jurisdiction over the underlying claims raised by plaintiffs in this action, (2) lack of subject matter jurisdiction because of the pending appeals and (3) improper service of the Order to Show Cause under Rules 4(c)(2)(C)(i) and (ii). On July 28, 1989, Washburn argued each of these points and **[410]** orally moved to dismiss the action against Talluto and LaPenna. The Court advised Washburn to submit a motion in proper form, with supporting affidavits, if he wished to move to dismiss or

quash service on behalf of respondents. On August 4, 1989, Washburn filed a cross-motion to dismiss plaintiffs' motion for contempt on behalf of respondents Talluto, LaPenna, White and McMonagle. The cross-motion asserted dismissal was appropriate because (1) service of the Order to Show Cause was improper under various provisions of Rule 4, (2) respondents enjoyed a good faith immunity as national citizens under the Privileges and Immunities clause of the 14th Amendment and (3) respondents were not offered an opportunity to purge their contempt, thus making the proceeding one for criminal contempt.[16]

Also on that date, Lee and Foreman filed a similar cross-motion to dismiss the motion for contempt, incorporating, in substantial part, the arguments made in the motion by Talluto, LaPenna, White and McMonagle. The cross-motion by Lee and Foreman was denied in part in accordance with an oral decision rendered on August 9, 1989. At that time, the Court reserved decision on the portion of the cross-motion by Lee and Foreman which was based upon the related cross-motion to be argued by Washburn. The latter cross-motion was denied in all respects, form the reasons stated by the Court during oral argument on August 10, 1989. Tr. 319-21. This denial was without

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[16] The substance of the arguments raised by Washburn, that service of the Order to Show Cause was improper and that the proceeding was one for criminal contempt, have been addressed and rejected by the Court in the preceding discussion. *See infra*, Sections A and B. The additional argument, that the Privileges and Immunities clause provides a shield for respondents who act in knowing violation of the Court's orders, was advanced by Washburn without relevant legal authority and is completely without foundation. In fact, the authorities that Washburn cites in his subsequent memorandum, ostensibly for support, directly contradict his argument. *See* Respondents' Memorandum dated August 30, 1989, filed September 15, 1989 at 7. Respondents have no Constitutional right to intentionally violate the orders of the Court.

prejudice. The Court explained that the motion, as it was addressed to the issue of service, was inadequate in its present form, as there were no affidavits by any of the respondents concerning service. Tr. 300-02, 318-21. The Court cautioned Washburn and the respondents that "[i]n the event the motion is renewed and denied as frivolous, the Court would entertain a motion by plaintiffs for appropriate sanctions." Memorandum Endorsement, filed August 10, 1989. On August 16, 1989, the Court extended the period for renewal of the motion until August 30, 1989, in order to allow Washburn time to make a thorough investigation of his claims, once again noting the possibility of Rule 11 sanctions should such a renewed motion be frivolous. Tr. 604-06.

On August 30, 1989, Washburn, on behalf of Talluto, LaPenna, White and McMonagle, filed a document requesting to renew the August 4 cross-motion. Subsequently, plaintiffs filed a motion for the imposition of Rule 11 sanctions against Washburn.

The document Washburn filed on August 30, 1989, titled "Respondents' Memorandum dated August 30, 1989" is signed by Washburn and purports to renew the earlier motion. No notice of motion was filed, nor were any supporting affidavits attached, despite the directive of the Court and the requirements of Civil Rule 3. No new arguments were advanced in the memorandum, with the exception of a section arguing that attorneys possess immunity from sanctions for their conduct in

a judicial proceeding and, therefore, that Rule 11 sanctions cannot be imposed upon them.[17]

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[17] This new argument advances yet another baseless claim. Washburn urges that Rule 11, as amended in 1983, violates the Rules Enabling Act, 28 U.S.C. § 2072, which provides that the Federal Rules of Civil Procedure "shall not abridge, enlarge, or modify any substantive right." He asserts that Rule 11 abridges an attorney's common law substantive right to absolute immunity from sanctions that arise from actions taken in judicial proceedings.

Nowhere, however, has Washburn cited any authority for his proposition that attorneys enjoy common law immunity from sanctions for frivolous conduct before a court. Indeed, courts have had the equitable power to award costs and attorneys fees as sanctions for frivolous conduct prior to the enactment of Rule 11. *See Hall v. Cole*, 412 U.S. 1, 5, 93 S.Ct. 1943, 1946, 36 L.Ed.2d 702 (1973), *superseded by statute on other grounds*, Act of Jan. 2, 1975, Pub.L.No. 93-600, § 3,88 Stat.1955. *See also* Notes of the Advisory Committee on Rule 11. As the Supreme Court has explained:

> [t]he power of a court over members of its bar is at least as great as its authority over litigants. If a court may tax counsel fees against a party who has litigated in bad faith, it certainly may assess those expenses against counsel who willfully abuse judicial processes.

Roadway Express, Inc. v. Piper, 447 U.S. 752, 766, 100 S.Ct. 2455, 2464, 65 L.Ed.2d 488 (1980), *superseded by statute on other grounds*, Act of September 12, 1980, Pub.L. 96-349, § 3, 94 Stat 1156, 1156 (codified as amended at 28 U.S.C. § 1927).

Moreover, the Supreme Court has upheld Rule 38, Federal Rule of Appellate Procedure, which awards costs and damages to the appellee when a court of appeals determines that an appeal is frivolous, against a challenge that it conflicted with a state statute and thus abridged a substantive right in violation of the Rules Enabling Act, *Burlington Northern Railroad Co. v. Woods*, 480 U.S. 1, 8, 107 S.Ct. 967, 971, 94 L.Ed.2d 1 (1986). The Supreme Court stated that:

> [t]he cardinal purpose of Congress in authorizing the development of a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidently affect litigants' substantive rights do

(continued...)

[411] 1. Standards for Imposing Rule 11 Sanctions

Rule 11 provides, in pertinent part, that: The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost in the litigation.... If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a

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[17](...continued)

> not violate [28 U.S.C. § 2072] if reasonably necessary to maintain the integrity of that system of rules.
>
> *Id.* at 5, 107 S.Ct. at 970.
>
> Rule 11, like Rule 38, may provide for the award of just damages to a party burdened by frivolous conduct, and is similarly essential to the underlying purpose of the Federal Rules of Civil Procedure, which are to be "construed to secure the just, speedy and inexpensive determination of every action." Rule 1, Fed.R.Civ.P.
>
> Furthermore, the Fifth Circuit, in upholding the validity of Rule 11 under the Rules Enabling Act, concluding that Rule 11 serves to regulate procedure by discouraging groundless judicial proceedings, and does not confer any new substantive rights. *Port Drum Co. v. Umphrey*, 852 F.2d 148, 150 (5th Cir. 1988); *See also Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 483 (3rd Cir.1987) (Rule 11 does not occasion a substantive change in the general rule against fee shifting, but instead provides for a correction of litigation abuses which does not offend the Rules Enabling Act); *Schmitz v. Campbell-Mithun, Inc.*, 124 F.R.D. 189, 193 (N.D.Ill.1989) (Rule 11 is procedural, designed to protect the integrity of papers submitted to the Court, and does not run afoul of the Rules Enabling Act).
>
> Accordingly, there is no basis for Washburn's assertion that Rule 11 violates the Rules Enabling Act by abrogating an illusory common law immunity to engage in vexatious conduct.

represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

While the imposition of sanctions is mandatory when a claim has absolutely no chance of success, the Court is to avoid hindsight review of the claim, to resolve all doubts in favor of the signer and to refrain from imposing sanctions where such action would stifle the enthusiasm or chill the creativity that is the very lifeblood of the law. *Motown Productions, Inc. v. Cacomm, Inc.*, 849 F.2d 781,785 (2d Cir. 1988); *Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir. 1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987); *Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985).

There need be no showing of bad faith on the part of the signer of the submission at issue for the imposition of sanctions. *Cross & Cross Properties, Ltd. v. Everett Allied Co.*, 886 F.2d 497, 504 (2d Cir.1989). **[412]** Instead, sanctions are appropriate where an attorney's signed submission fails to meet a test of objective reasonableness. *McMahon v. Shearson/American Express, Inc.*, 896 F.2d 17, 22 (2d Cir.1990); *Cross & Cross Properties, Ltd. v. Everett Allied Co., supra*, 886 F.2d at 504.

> Although other goals for the imposition of sanctions under Rule 11 may exist, for example, punishment for violation of the Rule, compensation for victim of the violation, and deterrence of others, focus should be on the drafters' aim of discouraging dilatory and abusive litigation tactics and eliminating frivolous claims and defenses, thereby speeding up and reducing the costs of the litigation process. Sanctions are the deterrent threat,

> [citation omitted] by which a district court judge may deal with counsel who ignore their broadened responsibility under the amended Rule to forward the effective administration of justice.

McMahon v. Shearson/American Express, Inc., supra, 896 F.2d at 21.

2. Washburn's Conduct and Rule 11 Sanctions

Washburn was twice warned by the Court that resubmitting the motion without factual affidavits or other additional support would expose him to the risk of Rule 11 sanctions. The arguments advanced by Washburn were each previously rejected by the Court and, with the exception of the challenge to the manner of service on Talluto and LaPenna, were each manifestly frivolous. When an attorney submits, or resubmits, a motion that he knew, or should have known, was meritless, Rule 11 sanctions are appropriate. *See Vekris v. Peoples Express Airlines, Inc.*, 707 F.Supp. 679, 682 (S.D.N.Y.1988) (submission of motion for reargument which merely rehashed arguments previously made and decided was precisely the sort of frivolous motion targeted by Rule 11); *Fuji Photo Film U.S.A. v. Aero Mayflower Transit Co., Inc.*, 112 F.R.D. 664, 667-68 (S.D.N.Y.1986); *Northern Trust Co. v. Muller*, 616 F.Supp. 788, 790 (N.D.Ill.1985). While the Court does not impose sanctions lightly, an objective analysis of Washburn's conduct in resubmitting the motion without affidavits or additional support, and in substantially the same manner as it had been when previously denied by the Court, leads only to the conclusion that Washburn violated Rule 11. Such vexatious conduct, which unduly delayed the adjudication of the contempt proceedings, cannot be countenanced by the Court, nor should plaintiffs be forced to bear the excess burden Washburn's actions placed upon them.

Accordingly, the Court imposes Rule 11 sanctions against Washburn, in the amount of the costs and attorneys' fees reasonably incurred by plaintiffs in filing their motion for sanctions and their response to the renewed motion to dismiss.

E. *The Motion to Strike a Portion of the Record and Impose Sanctions on Hale under 28 U.S.C. § 1987*

Plaintiffs moved to strike a portion of the record and for costs and attorneys' fees pursuant to 28 U.S.C. § 1927 against Hale, attorney for the Nathansons. At the close of the evidentiary hearing held regarding the conduct of Pearson and the Nathansons, Hale asserted that Ex. 9, a police videotape of the Dobbs Ferry demonstration on October 29, 1988, had been tampered with to include a "snippet" showing A. Nathanson sitting on the steps of the clinic seconds after Lt. Perilli read the October 27 Order to the demonstrators.

The foundation for Hale's serious assertion of impropriety concerning this piece of evidence was his observation, upon viewing the videotape in Court, that the particular segment in dispute showed the date but not the time, while the footage immediately preceding it showed the time. Hale had the opportunity to view the tape on August 9, 1988, prior to the hearing. He maintains, however, that he did not remember seeing the disputed segment at that time. Affidavit of John P. Hale, filed September 29, 1989. The Court allowed Hale to secure an expert to inspect the videotape, but Hale never availed himself of this opportunity. Instead, Hale interviewed Lt. Perilli and the operator of the police video machine, **[413]** and discovered that there was no basis to his claim. Hale notified the Court that he was withdrawing his objections to the videotape by letter, dated September 5, 1989. Prior to advising the Court that he withdrew his objections, however, Hale spoke with counsel for plaintiffs three times, each time broaching the

topic of settlement, as well as the issue of the videotape. Affidavit of Mary M. Gundrum, filed September 8, 1989 ¶¶ 5-7.

Plaintiffs ask that the portion of the record which contains Hale's admittedly erroneous assertion that the videotape was altered be stricken, in order to clarify the record and to remove the groundless suggestion of improper behavior on the part of plaintiffs and their counsel. Hale offers no objection to this portion of the motion. The Court believes these fallacious accusations have no place in the record, and agrees with plaintiffs' suggestion that they be stricken. Accordingly, pages 573 to 583 and pages 601, line 14 to 602, line 8, are hereby stricken from the record.

Plaintiffs next argue that sanctions should be imposed against Hale under 28 U.S.C. § 1927. Section 1927 provides that:

> [a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

This provision is to be construed narrowly and with caution by the courts. *Mone v. Commissioner of Internal Revenue*, 774 F.2d 570, 574 (2d Cir. 1985). To justify the imposition of sanctions under section 1927, the attorney's "conduct must be of an egregious nature, stamped by bad faith that is violative of recognized standards in the conduct of litigation." *Colucci v. New York Times, Co.*, 533 F.Supp. 1011, 1014 (S.D.N.Y. 1982). *See also McMahon v. Shearson/American Express, Inc.*, *supra*, 896 F.2d at 23.

Hale's conduct in (1) making such a serious accusation prior to undertaking an inquiry into its basis when the opportunity to inspect the tape had been previously made available to him, and (2) referring to this allegation in settlement conversations with plaintiffs, is more than a little troubling to the Court. See D.R. 7-105(A), Code of Professional Responsibility, Appendix to New York State Judiciary Law (a lawyer shall not threaten criminal charges solely in an attempt to obtain an advantage in a civil matter). In the Court's view, however,this conduct did not rise to the level of bad faith necessary to warrant the imposition of sanctions, as a discrepancy appeared to exist which could not be readily explained at the hearing, and Hale withdrew his charge upon discovering that it had no merit. *Cf. Woodfork v. Gavin*, 105 F.R.D. 100, 105 (N.D.Miss 1985) (sanctions imposed under section 1927 because attorney maintained allegations of fraud and criminal conduct after subsequent discovery proved these allegations to be unfounded). Therefore, no sanctions will be imposed against Hale.

CONCLUSION

Plaintiffs' motion for civil contempt is granted in part and denied in part. Defendants Randall Terry and Operation Rescue are adjudged in civil contempt of this Court's October 27 Order and Permanent Injunction and are assessed coercive civil penalties in the amount of $100,000. Defendant Herlihy is adjudged in civil contempt of this Court's May 4 Order and assessed coercive civil penalties in the amount of $25,000. Respondent B.O.R.N. is adjudged in civil contempt of this Court's October 27 Order and assessed coercive civil penalties in the amount of $25,000. Respondent Lee is adjudged in civil contempt of the Court's May 4 Order, October 27 Order and Permanent Injunction and assessed coercive civil penalties in the amount of $100,000. Respondent Foreman is adjudged in civil contempt of the Court's May 4, Order and Permanent Injunction and assessed coercive civil penalties in the amount of $25,000.

Respondents McMonagle and White are adjudged in civil contempt **[414]** of the Court's Permanent Injunction and assessed coercive civil penalties in the amount of $25,000. Respondent LaPenna is adjudged in civil contempt of the Court's May 4 Order and October 27 Order and assessed coercive civil penalties in the amount of $25,000. Respondent Talluto is adjudged in civil contempt of the Court's October 27 Order and Permanent Injunction and assessed coercive civil penalties in the amount of $50,000. Respondent Adelle Nathanson is adjudged in civil contempt of the Court's October 27 order and assessed coercive civil penalties in the amount of $25,000. Respondent Pearson is adjudged in civil contempt of the Court's Permanent Injunction and assessed coercive civil penalties in the amount of $25,000. Respondent Bernard Nathanson is not adjudged in civil contempt.

Each of the contemnors is liable to plaintiffs for a pro rata share of the attorneys' fees and costs incurred by plaintiffs as a result of bringing the contempt motion against him or her, with the exception of the renewed cross-motion to dismiss filed by attorney Washburn.

The renewed cross-motion to dismiss on behalf of respondents Talluto, LaPenna, White and McMonagle, is denied. Plaintiffs' motion for the imposition of Rule 11 sanctions against attorney Washburn is granted. Washburn is liable to plaintiffs for the attorneys' fees and costs they incurred as a result of filing their motion for sanctions and responding to his renewed cross-motion to dismiss.

Plaintiffs are directed to serve and file, within twenty (20) days of the date of this decision, an application detailing their expenses, including their attorneys' fees, regarding the contempt proceedings and the renewed cross-motion.

The motion by plaintiffs to strike a portion of the record and impose sanctions under 28 U.S.C. § 1927 against attorney

Hale is granted in part and denied in part. The record is stricken in accordance with plaintiffs' request, but the Court declines to impose sanctions on Hale.

In addition, plaintiffs are directed to confer with counsel representing respondent Slattery, and apprise the Court by letter no later than March 6, 1990, of several mutually convenient dates for a conference on the pending application to hold him in civil contempt. Defendants' requests to submit sur-reply briefs to the pending motions by plaintiffs for attorneys' fees and costs under 42 U.S.C. § 1988 and by the United States to confirm an order of attachment are granted. Defendants shall serve and file the sur-reply briefs by March 2, 1990, and each moving party may serve and file any final response by March 9, 1990.

Settle orders on notice.

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN, et al.,

Plaintiffs,

CITY OF NEW YORK,

Plaintiff-Intervenor,

-and-

UNITED STATES OF AMERICA,

Judgment Creditor,

-against-

RANDALL TERRY, et al.,

Defendants.

ORDER

88 Civ. 3071 (RJW)

Plaintiff's Order to Show Cause as to why certain named defendants and respondents should not be found in civil contempt of this court's orders, which was filed June 9, 1989, came on for hearing before the Court, Honorable Robert J. Ward, District Judge, presiding, and the issues having been duly heard on August 9, 10, 15 and 16, 1989 and a decision having been rendered on February 27, 1990.

IT IS ORDERED that the United States of America, as Judgment Creditor, recover of defendants and respondents as follows:

Defendants Randall Terry and Operation Rescue are adjudged in civil contempt of this Court's October 27 Order and Permanent Injunction and are assessed coercive civil penalties in the amount of $100,000. Defendant Thomas Herlihy is adjudged in civil contempt of this Court's May 4 Order and assessed coercive civil penalties in the amount of $25,000. Respondent Bistate Operation Rescue Network ("B.O.R.N.") is adjudged in civil contempt in this Court's October 27 Order and assessed coercive civil penalties in the amount of $25,000. Respondent Jesse Lee is adjudged in civil contempt of the Court's May 4 Order, October 27 Order and Permanent Injunction and assessed coercive civil penalties in the amount of $100,000. Respondent Joseph Foreman is adjudged in civil contempt of the Court's Permanent Injunction and assessed coercive civil penalties in the amount of $25,000. Respondents Michael McMonagle and Jeff White are adjudged in civil contempt of the Court's Permanent Injunction and assessed coercive civil penalties in the amount of $25,000. Respondent Michael LaPenna is adjudged in civil contempt of the Court's May 4 Order and October 27 Order and assessed coercive civil penalties in the amount of $25,000. Respondent Florence Talluto is adjudged in civil contempt of the Court's October 27 Order and Permanent Injunction and assessed coercive civil penalties in the amount of $50,000. Respondent Adelle Nathanson is adjudged in civil contempt of the Court's October 27 Order and assessed coercive civil penalties in the amount of $25,000. Respondent Robert Pearson is adjudged in

civil contempt of the Court's Permanent Injunction and assessed coercive civil penalties in the amount of $25,000.

Dated: New York, New York
May 8th, 1990

/s/ ROBERT J. WARD
Robert J. Ward

U.S. District Court Judge

APPENDIX G

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN; New York City Chapter of the National Organization for Women; National Organization for Women; Religious Coalition for Abortion Rights-New York Metropolitan Area; New York State National Abortion Rights Action League, Inc.; Planned Parenthood of New York City, Inc.; Eastern Women's Center, Inc.; Planned Parenthood Clinic (Bronx); Planned Parenthood Clinic (Brooklyn); Planned Parenthood Margaret Sanger Clinic (Manhattan); OB-GYN Pavilion; the Center for Reproductive and Sexual Health; VIP Medical Associates; Bill Baird Institute (Suffolk); Bill Baird Institute (Nassau); Dr. Thomas J. Mullin; Bill Baird; Reverend Beatrice Blair; Rabbi Dennis Math; Reverend Donald Morlan; and Pro-Choice Coalition. Plaintiffs,

and

City of New York, Plaintiff-Intervenor,

v.

Randall TERRY; Operation Rescue; Reverend James P. Lisante; Thomas Herlihy; John Doe(s) and Jane Doe(s), the last two being fictitious Names, the real names of said defendants being presently unknown to plaintiffs, said fictitious names being intended to designate organizations or persons who are members of defendant organizations, and others acting in concert with any of the defendants who are engaging in, or intend to engage in, the conduct complained of herein, Defendants.

No. 88 Civ. 3071 (RJW).
United States District Court,
S.D. New York.
November 8, 1990

[207][1] THE COURT: What I had in mind to do, because obviously there are a number of matters which may well be the subject of an appeal, would be to incorporate by reference the court's determination of February 27, 1990 which then would permit the parties, not only Mr. Slattery but the others who are similarly situated, to join in their challenge in connection with the appeal which has been deferred pending the determination of this proceeding.

MR. HARRINGTON: That is acceptable to Mr. Slattery, you Honor.

THE COURT: Is that agreeable to the plaintiffs as well?

MS. HERNANDEZ: Yes, your Honor.

THE COURT: Very well.

THE COURT: This is the decision of the court. Plaintiffs moved by order to show cause to hold respondent, Christopher Slattery ("Slattery") in civil contempt of court for violating the orders of this court which prohibited blocking access to medical facilities which performed abortions. Plaintiffs also seek to recover the costs and attorneys' fees they incurred in bringing this contempt motion.

Slattery cross-moved for an order pursuant to [208] Rule 12(b)(1) and 6, Fed.R.Civ.P., dismissing this proceeding or alternatively for the denial of the relief requested by plaintiffs.

For the reasons that follow, the motion to hold Slattery in civil contempt is granted, and the cross-motion is in all respects denied.

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[1] Bracketed numbers indicate page numbers from transcript of unreported decision. (Tr. pp. 207-21, November 8, 1990).

Familiarity with this court's opinions dated October 27,1988, and January 20, 1989 is assumed. In addition, the court assumes familiarity with its opinion dated February 27, 1990 and incorporates by reference the background facts and legal discussion which affect respondent Slattery.

As has been noted in the prior opinions of this court, plaintiffs commenced this action in New York State Supreme Court on April 25, 1988 seeking injunctive and declaratory relief to restrain a number of defendants, not including Slattery, from blocking access to medical facilities providing abortions. The initial proceedings were in state court, and on April 28, 1988 a temporary restraining order issued signed by Justice Herman Cahn of the Supreme Court, New York County, which in its initial form did not expressly enjoin Operation Rescue from blocking access to health-care facilities.

On May 2, as a result of a demonstration in front of a physician's office at 154 East 85th Street in **[209]** Manhattan, where abortions are performed, a second temporary restraining order was issued by Justice Cahn that enjoined the defendants from, "trespassing on, blocking, obstructing ingress into or egress from any facility at which abortions are performed in the City of New York, Nassau, Suffolk, or Westchester Counties from May 2, 1988 to May 7, 1988."

Defendants removed the action to this court on May 3, 1988. On May 4, this Court ruled that it would adopt and continue Justice Cahn's May 2, 1988 order and would modify it by:

(1) adding coercive sanctions of $25,000 for each day that the defendants violated the terms of the order; and,

(2) requiring defendants to notify the City of New York in advance of the location of any demonstration.

This court also ruled that failure to give such advance notice would make defendants liable for any resulting costs incurred by the city.

Numerous events transpired between May 4, and October 7, 1988 which are set forth in this Court's prior opinion, and are not necessary for the purpose of this decision.

On October 7, 1988, plaintiffs moved to modify the Court's prior injunction to cover the dates October 28, 29, and 31, in response to defendant's publicized plan **[210]** to conduct a "National day of rescue" at the end of October.

At the conclusion of an evidentiary hearing conducted on October 25 and 27, 1988, the Court granted plaintiff's motion and signed an order providing for appropriate preliminary relief.

Notwithstanding the issuance of the modified preliminary injunction on October 27 and the denial of a stay pending appeal, Operation Rescue organized and conducted two demonstrations on the morning of October 29, 1988 within the geographical area covered by the October 27 order.

From at least 8 a.m. till about 12:15 p.m. on October 29 approximately 250 Operation Rescue demonstrators blocked ingress to and egress from the Women's Pavilion medical clinic on Ashford Avenue in Dobbs Ferry, New York.

By this time, the Court's inunction had been extended to persons who aided and abetted the defendants, and it is plaintiffs' contention that Slattery is such a person.

The Court finds that on the evening of October 27, 1988, Slattery spoke to supporters of Operation Rescue at a rally and training session conducted at Glad Tidings Tabernacle Church. Slattery instructed the audience concerning the blockade which

was to take place on October 29 in Dobbs Ferry, New York. He indicated that the **[211]** participants should bring with them approximately $20 together with identification, and that they should be prepared to be arrested.

He then explained how to blockade a clinic including an activity described as "scooching", which appears to be a sideways movement which takes place while an individual is sitting down. Scooching enables the filling of gaps in the blockade in the event blockaders are removed by the police.

In the early morning of October 29, Slattery appeared at St. Agnes Church in the Times Square area of Manhattan. He directed people to proceed to the blockade site which up to that point had not been disclosed publicly. He subsequently to into a car driven by a woman from Staten Island and directed the driver to Dobbs Ferry.

He arrived at Dobbs Ferry at approximately 8 a.m. on the morning of October 29, 1988, and remained in the vicinity of the Women's Medical Center for the next four hours.

At approximately 8:30 a.m., he was present when Kelli Conlin read this Court's injunction through a bullhorn. He was present approximately an hour later when a police office read the injunction through a bullhorn. At that time he was located approximately 15 feet from the police officer. The court has viewed a video tape of the **[212]** reading and notes that the reading was audible except for brief periods when the bullhorn appeared to malfunction.

In addition, the Court would note that, despite an earlier statement that he was unable to hear what was said, due to the noise of the crowd, the videotape, which contains an audio, clearly proved that the crowd was virtually silent during most if not all of the reading.

Accordingly the Court finds that, at the very least, Slattery had notice of the injunction between 8:00 and 9:30 a.m. on the morning of October 29, 1988.

Following this, Slattery, using a walkie-talkie and headset, assisted in supervising the demonstration. He communicated on the walkie-talkie with others, and in addition was involved with dealings with the media and the police.

At approximately 11:40 a.m., he participated in an arrangement which was made with the police that the demonstrators would leave the area of the clinic at approximately 12 noon and would not be arrested if they did so.

He is depicted in the videotape leading the demonstrators from the scene.

The Court finds that Slattery's activities on the morning of October 29, 1988 aided and abetted in the violation of this Court's prior orders, including the order **[213]** of October 27, 1988.

The second incident occurred on January 14, 1989 in front of the VIP Medical Associates Clinic located at 72 Fifth Avenue in Manhattan. Slattery does not contest that he participated in this demonstration, and that he had notice of this Court's orders of injunction.

The Court of Appeals in its decision in this case clearly outlined the applicable law governing civil contempt proceedings, stating in pertinent part, "A court's inherent power to hold a party in civil contempt may be exercised only when (1) the order the party allegedly failed to comply with is clear and unambiguous, (2) the proof of noncompliance is clear and convincing; and (3) the party has not diligently attempted in a

reasonable manner to comply." 886 F.2d 1339 at 1351 (2d. Cir. 1989).

It is not necessary to show the party disobeyed the Court's order willfully *EEOC v. Local 638*, 753 F.2d 1172 at 1178 (2d. Cir. 1985).

Rule 65(d) Fed.R.Civ.P. provides that an injunctive order of the Court, "is binding only upon the parties to the action; their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

Rule 65(d) prevents defendants from carrying out **[214]** prohibited activity through others who have actual notice of the Court's orders. *Regal Knitwear v. NLRB*, 324 U.S. 9, 14 (1945).

Thus, civil contempt sanctions may be assessed against non-parties who had have actual notice of the orders in effect at the time in question and participated with defendants in violating those orders.

Respondent has interposed his objection by a motion to dismiss pursuant to Rule 12(b)(1) and (6) Fed.R.Civ.P., asserting that this Court lacks jurisdiction to preside over these contempt proceedings, and he joins with the other respondents in arguing that the imposition of sanctions in the context of this case would be tantamount to criminal, not civil contempt. The Court has previously rejected these arguments when by others similarly situated, and rejects the arguments of Slattery as well.

The October 27, 1988 order with which we are principally concerned, clearly includes persons in the position of Slattery. For example, the October 27 order provided that

"defendants, the officers, directors, agents, and representatives of defendants, and all other persons whomsoever acting in concert with them and with notice of this order (hereinafter "Operation Rescue or National Day of Rescue'") participants are (1), enjoined and restrained .... And it is further ORDERED that the failure to comply **[215]** with this Order by any Operation Rescue or National Day of Rescue participant with actual notice of the provisions of this order shall subject them to civil damages of $25,000 a day for any violations of this Order."

Similarly, the permanent injunction, which was in effect on January 14, 1989, defined Operation Rescue participants in the same manner as the October 27 order and provided that ... "The failure to comply with this Order by any Operation Rescue participant with actual notice of the provisions of this order shall subject him or her to civil damages of $25,000 per day for the first violation of this order, and it is further ORDERED each successive violation of this Order shall subject the contemnor to a civil contempt fine double that of the previous order."

Both provisions more than adequately warned those acting in concert with the defendant that they will be subject to civil penalties of $25,000 per day for violations of these orders.

The orders fully satisfy the specificity requirements of Rule 65(d). See 886 F.2d at 1351-52.

Plaintiffs assert that Slattery is liable for $50,000 due to his active involvement with defendants in violating the Court's October 27 order and the permanent injunction. This amount is computed as follows:

(1) $25,000 for the demonstration in violation of **[216]** the October 27 order at Dobbs Ferry, New York on October 29, 1988.

(2) $25,000 for the demonstration in violation of the permanent injunction at the Margaret Sanger Clinic on January 14, 1989.

I am going to correct that. I have used the Sanger Clinic which is located on Second Avenue and 22nd Street. That demonstration took place on January 13 and is not before the Court. The January 14 demonstration was at the VIP Medical Associates Clinic in Manhattan. Any reference previously made to the site of the January 14, 1989 demonstration as being at the Margaret Sanger Clinic is amended. The location is as I have just indicated.

The Court found that Slattery had notice of the October 27 order and the preliminary injunction, and aided and abetted in the demonstration which blocked access to the Women's Pavilion Medical Center in Dobbs Ferry, and respondent having determined not to contest the issues of the notice and participation in the January 14, 1989 demonstration which blocked access to the VIP Clinic, leads the Court to find that it has been established by clear and convincing proof that Slattery acted in concert with defendants in violating the Court's orders in blocking access to clinics with knowledge of the October 27 order and the permanent injunction.

[217] Consequently, Slattery is adjudged in civil contempt of the October 27, 1988 order, and the permanent injunction and is assessed coercive civil penalties in the amount of $50,000.

Slattery contends that penalties of this amount are unduly harsh and burdensome from a financial perspective. He is 35 years of age, has a wife and two children. His present salary is approximately $36,000 a year, and at the present time, he possesses little else in the way of assets, although the Court would point out that the record contains evidence of transfers of property during the period of June and July 1989 subsequent to

the events in question and at approximately the same time as the present order to show cause was signed by this Court.

Generally, the sanctions imposed after a finding of civil contempt serve two functions: to coerce future compliance and to remedy past noncompliance. *See generally United States v. United Mine Workers*, 330 U.S. 258, 302-04 (1947).

So far as the first of these functions is concerned, the District Judge sitting in equity is vested with wide discretion in fashioning a remedy. *Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir. 1979). *See*, for example, *Ingraham Co. v. Germanow*, 4 F.2d 1002, 1003 (2d Cir. 1925).

[218] By contrast, once a plaintiff proves that he has suffered harm because of the violation of the terms of an injunction, compensatory damages are appropriate.

In the present case, the plaintiffs have not demonstrated that compensatory damages are appropriate. Therefore, the remedy which the Court has determined to impose is in the nature of a fine payable to the Treasury of the United States. The Court has determined to impose a civil penalty of $25,000 with respect to the violation on October 29, 1988, and a penalty of $25,000 with respect to the violation on January 14, 1989.

Respondent has stated that he does not intend to violate this Court's orders at any time in the future. In view of this statement, and in view of respondent's financial condition, the Court suspends execution of the judgment with respect to the fine of $25,000 imposed in connection with the events of October 29, 1988 on condition that respondent will not violate the aforementioned orders at any time in the future.

In the event the Court finds a future violation of these orders, the Court would be prepared to vacate the stay of execution with respect to that portion of the judgment which imposes a $25,000 fine with respect to the events of October 29, 1988.

Attorneys' fees and costs: Plaintiffs seek **[219]** attorneys' fees and costs from Slattery to compensate them for their expenditures in bringing on the motion for contempt.

The permanent injunction expressly warned, "that each contemnor shall be jointly and severally liable for all attorneys' fees and related costs incurred by plaintiffs in enforcing this Order."

This additional penalty can properly be viewed as a coercive fine designed to insure compliance. An award of attorneys' fees and costs serves the compensatory purpose of civil contempt and avoids penalizing the complainant who is protected by the order for the actions of contemnors who purposely violate that order. *See Local 28 v. EEOC*, 478 U.S. 421, 444, Note 23 (1986); *Vuitton et Fils v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir. 1979). (If the violation of the Court's orders is wilful, compensatory damages to the complainant should include reasonable costs for prosecuting the contempt including attorneys' fees.)

The evidence more than adequately demonstrates the intentional violation of this Court's orders by Slattery. Accordingly, Slattery is liable for the attorneys' fees and costs incurred by plaintiffs as a result of bringing the contempt motion against him.

Plaintiffs are directed to serve and file within 20 days of the date of this decision an application **[220]** detailing their

expenses including their attorneys' fees regarding the contempt proceedings, and respondents' cross motion.

The Court directs that an order be settled on notice.

That constitutes the Court's decision. Consistent with the direction of the Court of Appeals for this circuit, I am prepared to hear counsel with respect to any factual or legal errors or omissions.

Ms. Hernandez.

MS. HERNANDEZ: Your Honor, only with respect to the United Mine Workers provision respecting the responsibility in failing to take any action to insure that the Court order would be followed. The affirmative responsibility of someone in Mr. slattery's position, according to the United Mine Workers case.

THE COURT: I believe since I found that he essentially aided and abetted in the violation of this Court's order, that is sufficient. I would agree, since he acted as an instructor, was equipped with a walkie-talkie and headset, he did indeed occupy a supervisory role. To the extent the finding is necessary, I would supplement my decision by finding that although he was in a supervisory position, he did not act in a way to insure compliance with **[221]** this Court's orders, but instead aided and abetted in violating the orders of the Court.

Do you wish to be heard further?

MS. HERNANDEZ: No, your Honor. Thank you.

THE COURT: Mr. Harrington?

MR. HARRINGTON: Your Honor, I have nothing other than the arguments that we previously made.

THE COURT: Very well.

MR. HARRINGTON: Thank you.

THE COURT: Court is adjourned.

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEW YORK STATE NATIONAL ORGANIZATION FOR WOMEN, et al.,

Plaintiffs,

88 Civ. 3071

CITY OF NEW YORK,

(R.J.W.)

Plaintiff-Intervenor,

-against-

RANDALL TERRY, et al.,

Defendants.

ORDER

Plaintiffs' Order to Show Cause, filed July 14, 1989, why respondent Christopher Slattery should not be held in contempt of this Court's Order granting a preliminary injunction, issued on October 27, 1988, and fined coercive civil sanctions for his actions of October 29, 1988 in Dobbs Ferry, New York, and why he should not be held in contempt of this Court's Order granting a permanent injunction, issued on January 10, 1989, and fined coercive civil sanctions for his actions of January 14, 1989 in New York, New York, having come on for hearing before the Court on November 7 and 8, 1990, the Honorable Robert J. Ward presiding, and the issues having been duly heard, and a decision having been rendered on November 8, 1990,

IT IS ORDERED AND ADJUDGED that respondent Christopher Slattery is fined coercive civil sanctions in the sum of $25,000, for his violation on January 14, 1989 of this Court's permanent injunction of January 10, 1989, which sum shall be paid forthwith into the Treasury of the United States.

IT IS FURTHER ORDERED AND ADJUDGED that respondent Slattery is fined coercive civil sanctions in the sum of $25,000 for his violation on October 29, 1988 of this Court's preliminary injunction of October 27, 1988, with regards to which $25,000, execution of judgment is stayed on condition that respondent will not violate the aforementioned orders at any time in the future.

IT IS FURTHER ORDERED AND ADJUDGED that in the event the Court finds a future violation of these orders, the Court would be prepared to vacate the stay of execution with respect to that portion of the judgment which imposes a $25,000 fine with respect to the events of October 29, 1988, in addition to imposing such further sanctions as would be independently warranted for any such future violations.

/s/ ROBERT J. WARD
Robert J. Ward

UNITED STATES DISTRICT JUDGE

Dated: New York, New York
November 8, 1990

Supreme Court, U.S.
FILED
SEP 30 1992
OFFICE OF THE CLERK

No. 92-282

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

REVEREND ROBERT PEARSON, et al.,

Petitioners,

—vs.—

PLANNED PARENTHOOD MARGARET SANGER CLINIC (MANHATTAN), et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Question Presented

I. Whether respondents' federal claim under 42 U.S.C. § 1985(3) was so obviously frivolous as to deprive the district court of federal jurisdiction to issue injunctions and contempt orders sustainable on independent state law grounds.

List of Parties

Respondents accept petitioners' list of the parties. In accordance with Rule 28.1 of the Rules of this Court, respondents report that Eastern Women's Center, Inc., Planned Parenthood of New York City, Inc., New York State National Abortion Rights Action League ("NARAL"), Inc., Religious Coalition for Abortion Rights - New York Metropolitan Area, and the National Organization for Women are corporations. None of them have parent or subsidiary companies, but New York State NARAL, Inc. is affiliated with the National Abortion Rights Action League, Inc. and Planned Parenthood of New York City, Inc. is affiliated with Planned Parenthood Federation of America, Inc.

TABLE OF CONTENTS

Question Presented i

List of Parties ii

Table of Contents iii

Table of Authorities . . . . . iv, v, vi

Counter Statement of the Case 2

Proceedings Below 3

Reasons for Denying the Writ 8

I. The Decision Of The Court Of Appeals That Respondents' Claim Under 42 U.S.C. § 1985(3) Is Not Frivolous And That The District Court's Order Of Contempt May Be Upheld Solely On State Grounds Does Not Warrant Review By This Court. 11

II. Petitioners Have Failed To Make The Requisite Showing To Consolidate This Case With Bray. 17

III. The Court's Imposition Of Coercive Fines For Civil Contempt Is Fully Consistent With This Court's Precedent As Reflected Most Recently In Spallone v. United States. 19

CONCLUSION 22

TABLE OF AUTHORITIES

CASES:

Bray v. Alexandria Women's Health Clinic, cert. granted, 111 S.Ct. 1070 (1991) . . . . . passim

Cousins v. Terry, 721 F. Supp. 426 (N.D.N.Y. 1989). 14

Goosby v. Osser, 409 U.S. 512, 518 (1973) 13, 16

Hagans v. Lavine, 415 U.S. 528, 537-38 (1974). 13, 14, 16

Hicks v. Feiock, 485 U.S. 624 (1988), ... 20

Levering & Garrigues Co. v. Morrin, 289 U.S. 103 (1933) 12, 13

N.Y. State Nat'l Org. for Women v. Terry, 886 F.2d 1339 (2d Cir. 1989) cert. denied 495 U.S. 947 (1990) . . . . . passim

N.Y. State Nat'l Org. for Women v. Terry, 961 F.2d 390 (2d Cir. 1992) 2, 6

N.Y. State Nat'l Org. for Women v. Terry, 704 F. Supp. 1247 (S.D.N.Y. 1989), aff'd, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990) 2, 4-5

NOW v. Operation Rescue, 726 F. Supp. 1483 (E.D. Va. 1989), aff'd, 914 F.2d 582 (4th Cir. 1990); cert. granted sub nom. Bray v. Alexandria Women's Health Clinic, 111 S. Ct. 1070 (1991) 15

NOW v. Operation Rescue, 747 F. Supp. 760 (D.D.C. 1990) 15

Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 666-67 (1974) 13

Planned Parenthood Assn. of San Mateo County v. Holy Angels Catholic Church, 765 F. Supp. 617 (N.D. Cal. 1991) 14, 15

Portland Feminist Women's Health Center v. Advocates for Life, Inc., 712 F. Supp. 165 (D. Or. 1988) 14

Pro-Choice Network of Western New York v. Project Rescue Western New York, Civ. 90-1004A (W.D.N.Y. Feb. 14, 1992) 14

Roe v. Operation Rescue, 710 F. Supp. 577 (E.D. Pa. 1989), aff'd, 919 F.2d 857 (3d Cir. 1990) 14

Shillitani v. United States, 384 U.S. 364, 370 (1966) 20

Southwestern Medical Clinics v. Operation Rescue, 744 F. Supp. 230 (D. Nev. 1989) 14

Spallone v. United States, 493 U.S. 265 (1990) 19, 20, 21

Talluto, et al. v. Planned Parenthood, Margaret Sanger Clinic, et al., 112 S. Ct. 957 (1992) 3, 7

United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966) 12, 13

United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72 (1988) 17

Walker v. City of Birmingham, 388 U.S. 307 (1967) 16

Women's Health Care Services, P.A. v. Operation Rescue, 773 F. Supp. 258 (D. Kan. 1991) 15

STATUTES:

28 U.S.C. § 2281 13

42 U.S.C. § 1985(3) . . . . . passim

Fed. R. Civ. P, Rule 65(d) 7

No. 92-282

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

REVEREND ROBERT PEARSON, et al.,

Petitioners,

vs.

PLANNED PARENTHOOD MARGARET SANGER CLINIC (MANHATTAN), et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Counter Statement of the Case

Respondents do not adopt the petitioners' statement of the case, which contains several misstatements of fact and law.

Petitioners are eight individuals who have knowingly violated one or more injunctive orders issued by the United States District Court for the Southern District of New York. These injunctive orders prohibited petitioners from blocking access to women's health clinics where abortions are performed in New York City, and in Westchester, Suffolk and Nassau counties in New York State. The injunctions, which rest on federal and independent state grounds, were unanimously affirmed in 1989 by the U.S. Court of Appeals for the Second Circuit, N.Y. State Nat'l Org. for Women v. Terry, 704 F. Supp. 1247 (S.D.N.Y. 1989), aff'd, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990) and affirmed again in 1992, N.Y. State Nat'l Org. for Women v. Terry, 961 F.2d 390 (2d Cir. 1992). This

Court denied certiorari with respect to the underlying injunction, and denied certiorari again when petitioners sought certiorari before judgment in this case. Talluto, et al. v. Planned Parenthood, Margaret Sanger Clinic, et al., 112 S. Ct. 957 (1992). Petitioner's arguments have thus been rejected by the court of appeals and this Court twice. This writ merely repeats the same arguments which have already been twice rejected, and it should therefore be denied.

Proceedings Below

The orders violated by petitioners were issued as a result of a 1988 suit brought by respondents against Operation Rescue, an unincorporated association whose members organize and carry out mob blockades of women's health clinics that provide abortion services, and against Operation Rescue leaders Randall Terry, Thomas Herlihy and James Lisante. Originally filed in New York State

Supreme Court, the suit was removed by the defendants to the U.S. District Court for the Southern District of New York. Southern District Judge Ward issued a Temporary Restraining Order on May 4, 1988, a Preliminary Injunction on October 27, 1988, and a permanent injunction on January 10, 1989,[1] upon granting summary judgment to respondents and to plaintiff - intervenor, the City of New York, on two state law claims and a 42 U.S.C. § 1985(3) claim,[2] See generally, N.Y. State Nat'l Org. for Women,

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[1] The injunctive orders were reviewed by the United States Court of Appeals for the Second Circuit in 1989 and unanimously affirmed, with the one modification that the contempt fines be payable to the U.S. Treasury instead of to plaintiffs. N.Y. State Nat'l Org. for Women v. Terry, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990). The court of appeals held that the district court had subject matter jurisdiction under 42 U.S.C. § 1985(3) and had correctly exercised pendent jurisdiction over respondents' trespass and the plaintiff-intervenor City of New York's public nuisance claims, and that summary judgment was correctly granted on all three claims by the district court. Id.

[2] Petitioners misleadingly describe the proceedings below by referring to respondents' "assertions" of two federal causes of action and "various pendent state causes of action including trespass." Petition at 4. Petitioners fail to clarify that the injunctions are based on three claims which respondents and plaintiff-intervenor the City of New York not only asserted but on which they won summary judgment, which was

(continued...)

704 F. Supp. 1247 (S.D.N.Y.), aff'd, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990). All three injunctive orders make clear that those who oppose women's rights to choose abortion are free to picket and protest. The orders, however, also contain express warnings that knowing violators of the orders who, acting in concert with defendants, physically blockade health care facilities, are subject to civil coercive contempt fines. Petition App. at A-30, A-34, A-38.

The eight petitioners are among thirteen individuals and groups to have been found in contempt by the district court for knowing violations of one or more of the injunctive orders. Twelve contemnors, including the petitioners, consolidated their appeals from two different contempt

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[2] (...continued)
upheld by the court of appeals: trespass and public nuisance under New York State law and 42 U.S.C. § 1985(3) (right to travel violation). N.Y. State Nat'l Org. for Women, 704 F. Supp. 1247 (S.D.N.Y.), aff'd, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990). The other "asserted causes of action "in respondents' original complaint are irrelevant at this stage.

orders of the district court before the court of appeals. N.Y. State Nat'l Org. for Women v. Terry, 961 F.2d 390 (2d Cir. 1992). The first of the challenged district court judgments held in contempt seven of the petitioners -- Talluto, LaPenna, Lee, Foreman, McMonagle, White and Pearson -- and Operation Rescue, B.O.R.N. (a local affiliate), Terry and Herlihy. Of these contemnors, only Pearson denied acting with notice of the injunction. None of the others disputed knowledge of the injunctions' existence and terms, acting in concert with defendants or any of respondents' other factual allegations of their contumacious conduct; consequently the district court granted summary judgment on contempt against them. Id. The district court held a proceeding to determine the facts as to Pearson's contempt before also finding him in contempt. Id.

The second judgment of the district court held the eighth petitioner, Christopher Slattery, in contempt of two

of the injunctive orders after a separate hearing on disputed facts. Petition App. at A-95-A-107. The district court found all the petitioners to be "persons in active concert or participation with [defendants] who receive[d] actual notice of the order by personal service or otherwise," under Rule 65(d), Fed. R. Civ. P., and who knowingly violated the injunctions' terms.

Prior to the court of appeals reaching a decision, petitioners filed a writ of certiorari before this Court seeking review before the Second Circuit reached its decision. This petition was denied on January 21, 1992. Talluto, et al. v. Planned Parenthood Margaret Sanger Clinic, et al., 112 S. Ct. 957 (1992).

On April 13, 1992, the court of appeals in large measure affirmed the district court's orders. The court held that most of the issues raised on appeal had already been decided by their previous rulings in N.Y. State Nat'l Org. for Women v. Terry, 886 F.2d 1339 (2d Cir. 1989) cert.

denied, 495 U.S. 947 (1990). The Court specifically held that the district court had jurisdiction to enter the injunctions. It reversed only the contempt orders as to respondents-appellants Florence Talluto and Michael LaPenna for improper service, and a Rule 11 sanction assessed against counsel for appellant.[3]

Reasons for Denying the Writ

Although Petitioners seek to portray this case as presenting important legal issues and stress the similarities between this case and Bray v. Alexandria Women's Health Clinic, cert. granted, 111 S.Ct. 1070 (1991) ("Bray"), petitioners miss the only point relevant here. The contempt order appealed from here must be sustained unless plaintiffs' federal claim was so frivolous as to deprive the district court of jurisdiction. If the federal claim, premised on 42 U.S.C. § 1985(3), was clearly substantial, the district

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[3] None of these parties are petitioning this Court.

court had jurisdiction to issue the injunction on the basis of the pendent state law claims, not challenged here. That the § 1985(3) claim was at the very least not frivolous is demonstrated beyond a doubt by the unanimous Second Circuit decision, by substantial support elsewhere in the case law, and by the fact that this Court saw the need to request reargument on the issue in Bray. Thus, even if this Court were ultimately to reverse Bray, petitioners would have no basis for escaping liability for their flagrant and largely undisputed violations of the federal court orders.

The court of appeals explicitly held in this case that the contempt order -- based as it is on federal as well as pendent state law grounds -- was proper on pendent state grounds since the federal claim was substantial. Because the district court's pendent jurisdiction was correctly exercised, even if this Court deems the § 1985(3) claims made in Bray to be without merit and thus holds that no future § 1985(3) claim could justify the exercise of pendent

jurisdiction over state law claims, the injunctions in this case would be upheld on the pendent state law grounds as the underlying federal claims were clearly substantial when the injunctions were issued.

Rule 10 of the United States Supreme Court Rules provides that a petition for a writ of certiorari will only be granted where there are specified reasons for doing so. As none of those reasons obtain here, certiorari should be denied. Petitioners do not cite to any circuit split on the issue of the parameters or standards relating to the exercise of pendent jurisdiction, nor do they suggest a conflict in any decisions regarding this issue. Moreover, there is simply no authority anywhere suggesting that the § 1985(3) claim is frivolous. Clearly, this matter does not rise to the level of importance necessary to justify the grant of certiorari in this case.

Rather, petitioners seek to obtain a second chance to challenge the merits of an underlying order which the court

of appeals has already declared proper. During the segment of this litigation involving the merits of the underlying injunctions, the court of appeals decided the injunction was proper and this Court refused to grant certiorari on that decision. In asking this Court to revisit the merits of the underlying order in this case, petitioners seek to re-review the merits of an injunction applicable to them on state and federal grounds, the propriety of which they have already fully litigated. Accordingly, there is no reason to grant certiorari in this case or to hold it pending the outcome of Bray, and there is no need to consolidate this case with Bray.

I. The Decision Of The Court Of Appeals That Respondents' Claim Under 42 U.S.C. § 1985(3) Is Not Frivolous And That The District Court's Order Of Contempt May Be Upheld Solely On State Grounds Does Not Warrant Review By This Court.

The underlying injunctive orders pursuant to which contempt proceedings were brought against appellants were

premised not only upon 42 U.S.C. § 1985(3), but also upon the independent state law grounds of trespass and public nuisance. Accordingly, the court of appeals recognized that the district court's actions could be sustained on the state law grounds, which have not been separately challenged, so long as the federal claim asserted by plaintiffs "ha[s] substance sufficient to confer subject matter jurisdiction on the court." United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966) (citing Levering & Garrigues Co. v. Morrin, 289 U.S. 103 (1933)). Petition App. at A-13. In other words, petitioners' challenge to the contempt findings and fines against them could only succeed if this Court were to decide that the § 1985(3) claim was wholly frivolous at the time the injunction issued, and that therefore the district court had no jurisdiction to decide the state law claims.

Pendent jurisdiction is proper so long as the federal questions raised in the complaint are "substantial" and the state and federal law claims "derive from a common

nucleus of operative fact." United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

Where a claim is based on reasonable interpretation of, and not foreclosed by, existing precedent, it meets the substantiality requirement necessary to confer jurisdiction on a federal court over pendent state claims:

> [C]laims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281. A claim is insubstantial only if its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." Hagans v. Lavine, 415 U.S. 528, 537-38 (1974) (quoting Goosby v. Osser, 409 U.S. 512, 518 (1973)) (internal quotations omitted).

See also Levering & Garraigues Co. v. Morrin, 289 U.S. 103, 105-06; Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 666-67 (1974).

The court of appeals in this case addressed this very

issue and explained that, "only a federal claim that is "'so attenuated and unsubstantial as to be absolutely devoid of merit'" would preclude the district court's exercise of jurisdiction over the state trespass and public nuisance claims presented here." Petition App. at A-13 (citing Hagans v. Lavine, 415 U.S. 528, 536-37 (1974) (internal quotations omitted).

Here the test of substantiality is obviously met. No prior cases of this Court even suggest that the federal claim is without merit, much less frivolous. The claim has been explicitly endorsed by three courts of appeals and numerous district courts.[4] As the court of appeals concluded, "Given

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[4] Cousins v. Terry, 721 F. Supp. 426 (N.D.N.Y. 1989); Pro-Choice Network of Western New York v. Project Rescue Western New York, Civ. 90-1004A (W.D.N.Y. Feb. 14, 1992); Southwestern Medical Clinics v. Operation Rescue, 744 F. Supp. 230 (D. Nev. 1989); New York State NOW v. Terry, 704 F. Supp. 1247 (S.D.N.Y.), aff'd, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990); Roe v. Operation Rescue, 710 F. Supp. 577 (E.D. Pa. 1989), aff'd, 919 F.2d 857 (3d Cir. 1990) (Dist. Ct. issued injunction on federal and state grounds; court of appeals did not reach federal claims but based decision on state grounds and pendent jurisdiction); Portland Feminist Women's Health Center v. Advocates for Life, Inc., 712 F. Supp. 165 (D. Or. 1988), aff'd, 859 F.2d 681 (9th Cir. 1988); Planned

(continued...)

our ruling in Terry I, and the general state of the law on this issue, see National Org. for Women v. Operation Rescue, 914 F.2d at 585 (collecting cases), it appears clear that plaintiffs-appellees have asserted a substantial federal claim adequate to ground jurisdiction over the state trespass and public nuisance claims." Petition App. at A-13.

Furthermore, this Court declined to grant certiorari to address this precise question in May 1990 and in January, 1992, and given that nothing has changed since that time there is no basis to revisit that question now. Since respondents' § 1985(3) claims are based squarely on arguable interpretations of Supreme Court and other federal precedent, they are, at a minimum, substantial under Hagans and Goosby. Accordingly, as the court of appeals

(...continued)
Parenthood Assn. of San Mateo County v. Holy Angels Catholic Church, 765 F. Supp. 617 (N.D. Cal. 1991); NOW v. Operation Rescue, 726 F. Supp. 1483 (E.D. Va. 1989), aff'd, 914 F.2d 582 (4th Cir. 1990); cert. granted sub nom. Bray v. Alexandria Women's Health Clinic, 111 S. Ct. 1070 (1991); NOW v. Operation Rescue, 747 F. Supp. 760 (D.D.C. 1990); Women's Health Care Services, P.A. v. Operation Rescue, 773 F. Supp. 258 (D. Kan. 1991).

noted "[e]ven if the Supreme Court were to reverse the Fourth Circuit in Bray, however, it is unlikely that appellants could benefit from that ruling in this case." Petition App. at A-12.[5]

Petitioners have failed to address this standard. While Petitioners label this federal claim with various perjoratives, they never explain how a federal claim with the judicial endorsements that this one has can possibly be called "patently insubstantial." Petition at 11. Apart from reiterating substantive arguments on the merits of the

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[5] It is apparent that petitioners are really concerned with what they variously refer to as the "excessive monetary penalties" assessed against them (Petition App. at 9), the "phenomenally large contempt penalties" (Petition App. at 8), and the "phenomenally large fines" (Petition App. at 3). These fines, however, were delineated in the earlier injunction in this case, the basis of which petitioners appealed and lost. Indeed, petitioners asked this Court to grant certiorari to review the validity of that underlying decision, and this Court denied their request. Petitioners have already had their chance to challenge the validity of the underlying injunction. It is wholly improper for petitioners to attempt to challenge the substantive validity of that underlying injunction again, after they have fully litigated that issue, have been denied certiorari on that issue and have also been found in contempt thereof. Cf. Walker v. City of Birmingham, 388 U.S. 307 (1967) (rather than violating injunction, proper procedure for attacking injunction (and underlying ordinance) is to apply to court to have injunction dissolved, and, if that fails, to follow procedure for expedited appellate review).

§ 1985(3) claims, petitioners advance no authority in support of their position.[6]

In these circumstances, the judgment below, resting as it does on violations of New York trespass and public nuisance law as well as of Section 1985(3), must be affirmed. This Court need not grant certiorari or hold this case pending a decision in Bray.

II. Petitioners Have Failed To Make The Requisite Showing To Consolidate This Case With Bray.

Petitioners ask this Court to consolidate this case with Bray v. Alexandria Women's Health Clinic, cert. granted, 111 S.Ct. 1070, currently pending before this Court. That case has been fully briefed and was argued before the Court

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[6] Petitioners note that United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72 (1988), stands for the general proposition that a non-party may attack the subject matter jurisdiction of the lower court to issue the order. Petition at 9. Subject matter jurisdiction, however, either exists or does not exist. The court of appeals' 1989 ruling in this case that the district court had subject matter jurisdiction to enter judgment and issue injunctions applies to non-parties as well as to parties.

on October 16, 1991. It has been scheduled for reargument on October 6, 1992, the first week of the new term.

The purported basis for the request for consolidation is that the cases present similar issues. As demonstrated above, however, there are vast differences between the cases. Though this case and Bray raise similar underlying questions under § 1985(3), the instant case is essentially a contempt case of an injunction the court of appeals explicitly noted was based on federal and state grounds.

The Court would gain no benefit in perspective by consolidating the cases. Belatedly adding this case to the determination of Bray would merely be disruptive. There would be no time to brief this case before the reargument in Bray and that case has already been pending more than a year.

Furthermore, even if petitioners had presented some good faith explanation for their failure to petition earlier,[7]

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[7] Petitioners have sat on their hands for more than 4 months since (continued...)

the Court does not have an obligation to hear all parties who may be interested in a given issue.

III. The Court's Imposition Of Coercive Fines For Civil Contempt Is Fully Consistent With This Court's Precedent As Reflected Most Recently In Spallone v. United States.

Petitioners argue that the civil contempt fines imposed on them were actually penalties for criminal contempt, and therefore could not be imposed without a full trial. However, the fines are a classic example of coercive civil contempt. The district court expressly included the threat of future fines in its injunction to coerce compliance, and only levied the fines after petitioners were found to have violated the order with notice of its terms.

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[7] (...continued)
April 13, 1992, the date that the court of appeals decided this case. Now, more than 10 months after this Court heard oral argument in Bray and 2 months after the Court decided to hear reargument, petitioners, who never even filed an amicus brief in Bray, have discovered a sudden necessity to have their case consolidated with Bray. Such a claim is at best specious. Even more, they filed an application for an extension of time to file their petition on June 30, 1992, and submitted their brief on August 17, 1992.

Petitioners neglect even to mention this Court's most recent affirmation that fines set forth in an order to coerce future compliance are civil, not criminal, contempt sanctions. In Spallone v. United States, 493 U.S. 265 (1990), this Court recognized that an order containing such a sanction, the imposition of which is conditional upon contempt following entry of the order, falls within a court's "inherent power to enforce compliance with . . . lawful orders through civil contempt." 493 U.S. at 276, quoting Shillitani v. United States, 384 U.S. 364, 370 (1966).[8]

Here, as in Spallone, the district court was faced with open contempt of an earlier court order. On October 27, 1988, the District Court Judge (affirming the state court order) entered an order which prohibited petitioners from

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[8] Hicks v. Feiock, 485 U.S. 624 (1988), which petitioners cite, Petition at 15, 16, 18, affirms this same principle. If the petitioner can avoid paying the threatened fine simply by obeying the court's order (here by allowing access to clinics targeted for Operation Rescue demonstrations), the contempt fine is remedial, conditional and civil in nature. Cases cited by petitioners, Petition App. at 15-19, draw the precise distinctions drawn in Spallone, i.e., fines imposed to coerce compliance are civil; fines imposed to punish are criminal.

blocking access to abortion clinics. Petitioners violated that order and were found in contempt. Like the Spallone court, the district court here responded appropriately by including civil coercive sanctions in an order designed to secure future compliance. Petitioners decided not to comply, knowing the consequences. The imposition of the promised civil contempt fines after petitioners' adjudicated violations of the injunction was entirely appropriate. This court need not grant certiorari to restate the principles so recently enunciated in Spallone.

Petitioners have not made the showings necessary to invoke this extraordinary writ. Therefore, the petition for a writ of certiorari should be denied and this case should not be consolidated with Bray.

CONCLUSION

For all the foregoing reasons, respondents respectfully urge this court to deny the petition for a writ of certiorari.

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New York, New York

Respectfully Submitted

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